Office - Supreme Court, U.S.
FILED
JAN 9 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 685

RCA COMMUNICATIONS, INC.,

Petitioner,

vs.

FEDERAL COMMUNICATIONS COMMISSION and MACKAY RADIO AND TELEGRAPH COMPANY, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

JOHN T. CAHILL,
Attorney for Petitioner,
63 Wall Street,
New York 5, N. Y.

JOHN W. NIELDS,
LAWRENCE J. MCKAY,
HOWARD R. HAWKINS,
THOMAS W. HILL, JR.,
Of Counsel.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

INDEX.

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	3
Reasons for Granting the Writ	9
Conclusion	14
Appendix A	15
Appendix B	82
Appendix C	90

Table of Cases.

	PAGE
Ann Arbor R. Co. v. *Michigan Public Service Commission*, 91 F. Supp. 668 (E. D. Mich. 1950)	13
Atlantic Coastline R. Co. v. *Public Service Commission of South Carolina*, 77 F. Supp. 675 (E. D. S. C. 1948)	13
Capital Transit Co. v. *Public Utilities Commission*, 213 F. 2d 176, 187 (D. C. Cir. 1953), *cert. den.*, 348 U. S. 816 (1954)	12
Chesapeake & Ohio Railroad Co. v. *Public Service Commission of Virginia*, 242 U. S. 603 (1917)	13
Chicago B. & Q. R. Co. v. *Illinois Commerce Commission*, 82 F. Supp. 368 (N. D. Ill. 1949)	13
Federal Communications Commission v. *RCA Communications, Inc.*, 346 U. S. 86 (1953)	2, 4
Mackay Radio & Telegraph Co., Inc., 12 F. C. C. 478 (1947)	13
Mackay Radio and Telegraph Company, Inc. v. *Federal Communications Commission*, 68 App. D. C. 336, 97 F. 2d 641 (1938)	13
Postal Telegraph-Cable Company, 9 F. C. C. 271 (1943)	13
Press Wireless, Inc., F. C. C. Docket No. 7822 (1949)	13
Secretary of Agriculture v. *United States*, 350 U. S. 162 (1956)	11
United Airlines, Inc. v. *CAB*, 81 App. D. C. 89, 155 F. 2d 169, 174 (1946)	11
United States v. *Baltimore & Ohio Railroad*, 293 U. S. 454 (1935)	11

Statutes.

	PAGE
Sections 1 and 309 of the Communications Act of 1934, 48 Stat. 1064, 1085 (66 Stat. 721; 70 Stat. ....., Pub. L. No. 391, 84th Cong. 2d Sess. (Jan. 20, 1956))	3
47 U. S. C. §§151 and 309 and Section 10(a), (e) of the Administrative Procedure Act, 60 Stat. 243; 5 U. S. C. §1009(a), (e), (1952)	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. .....

RCA COMMUNICATIONS, INC.,

Petitioner,

vs.

FEDERAL COMMUNICATIONS COMMISSION and MACKAY RADIO AND TELEGRAPH COMPANY, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

RCA Communications, Inc. (RCAC) prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the District of Columbia.

The judgment below relates to the grant of duplicate radiotelegraph circuits to Mackay Radio and Telegraph Company, Inc. (Mackay) to The Netherlands and to Portugal by a bare majority of the Federal Communications Commission (4-3) (Commission). It affirmed the Order of the Commission modifying the license of Mackay to permit direct, and indirect via Tangier, radiotelegraph communication with The Netherlands and Portugal.

This matter was before the Commission pursuant to a decision of this Court remanding the matter to the Commission. *Federal Communications Commission* v. *RCA Communications, Inc.,* 346 U. S. 86 (1953).

Opinions Below.

The decision on remand of the Commission has not been officially reported, and is printed as Appendix A hereto. The opinion of the Court of Appeals is reported in ..... F. 2d ....., and is printed as Appendix B hereto.

Jurisdiction.

The judgment of the Court of Appeals was entered on October 11, 1956. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

Questions Presented.

1. Has the Commission acted in conformity with the mandate of this Court of June 8, 1953?

This Court held that the Commission could not base a decision granting duplicative radiotelegraph circuits upon an assumed national policy in favor of competition wherever competition is reasonably feasible. The Court required, instead, that even assuming competition to be reasonably feasible, the Commission must at least warrant that competition would serve the public interest—some beneficial purpose, such as maintaining good service and improving it.

What the Commission did in response to this Court's mandate was to substitute for the rejected vocabulary of its first decision to the effect that "Competition can generally be expected to provide a powerful incentive for the

rendition of better service at lower cost'"* [346 U. S. at 94 n. 6], the vocabulary of "Our experience in this field leads us to the conclusion that it would be unrealistic to assume that [plant additions, improved service and rate reductions] would have been made to the same extent as actually were made in the absence of competition." [DR 39**]

The question therefore is whether the Commission can rely on an unidentified and unspecified experience as a substitute for its discredited theory of national policy in favor of competition, ignoring its basic findings which have been held insufficient to support, and to contradict, a conclusion that duplicative circuits are in the public interest.

2. Whether the Commission was entitled to take RCAC's net revenues from other circuits into account in finding the competition created by a duplicative direct radiotelegraph circuit to Portugal "reasonably feasible" in spite of the fact that, as a result, both circuits to Portugal are operated at a loss.

Statutes Involved.

The statutes pertinent to this petition are Sections 1 and 309 of the Communications Act of 1934, 48 Stat. 1064, 1085 (66 Stat. 721; 70 Stat. 1, Pub. L. No. 391, 84th Cong. 2d Sess. (Jan. 20, 1956)); 47 U. S. C. §§ 151 and 309 and Section 10(a), (e) of the Administrative Procedure Act, 60 Stat. 243; 5 U. S. C. § 1009(a) (e), (1952). (Appendix C.)

Statement.

RCAC is a wholly-owned subsidiary of Radio Corporation of America, furnishing radiotelegraph service between

* Emphasis ours throughout.

** DR references are to paragraphs in the decision on remand of the Commission which appears at Appendix A.

the United States and some sixty-four points throughout the world (DR 25). RCAC has been operating direct radio telegraph service to The Netherlands and to Portugal for approximately twenty years (R. 110, 113).

Mackay and the Commercial Cable Company are both wholly-owned subsidiaries of American Cable and Radio Corporation, which is, in turn, controlled by the International Telephone and Telegraph Corporation. Mackay operates direct radiotelegraph circuits between the United States and approximately thirty-seven foreign and overseas points (DR 25). Common carrier service between the United States and The Netherlands and Portugal is provided by the cable facilities of the Commercial Cable Company and of the Western Union Telegraph Company.

The duplicative circuits to The Netherlands and Portugal here involved were granted by the Commission to Mackay on February 23, 1951 (two Commissioners dissenting).

RCAC alone has more than adequate facilities to meet the entire public requirements for all service with The Netherlands and Portugal, having an average excess capacity to and from these points of 90% and 78% respectively (R. 131-132, 516-517). In addition to this tremendous over-capacity, there is available to the public the trans-Atlantic telephone services of the American Telephone & Telegraph Company and the air mail (R. 570, 583).

This Court, in remanding, held that the Commission could not grant duplicative circuits on the basis of a national policy in favor of competition and remanded the matter to the Commission for such disposition as was open under its mandate. *Federal Communications, Inc.* v. *RCA Communications, Inc.*, 346 U. S. 86 (1953).

This Court remanded the matter because of the failure on the part of the Commission to rely

> ". . . on its own evaluation of the needs of the industry rather than on what it deemed a national policy, [in favor of competition] . . ." 346 U. S. at 94.

The Court stated as a rule of decision:

> "We think it not inadmissible for the Commission, when it makes manifest that in so doing [granting duplicative circuits] it is conscientiously exercising the discretion given it by Congress, to reach a conclusion whereby authorizations would be granted wherever competition is reasonably feasible." 346 U. S. at 96.

The Court stated that while the Commission was not required to make "specific findings of tangible benefit", it nevertheless had the obligation to

> ". . . at least warrant, as it were, that competition would serve some beneficial purpose such as maintaining good service and improving it." 346 U. S. at 97.

The Court stated:

> ". . . it is not too much to ask that there be ground for reasonable expectation that competition may have some beneficial effect." 346 U. S. at 97.

Mr. Justice Douglas, while agreeing with this Court and with the Court of Appeals that it was necessary for the Commission to establish that the licensing of a competitive service offers a reasonable expectation of some beneficial effect as measured by the public interest, dissented from the opinion of this Court on the ground that the facts of record were so unequivocal that there was no apparent way for the Commission to meet the standard approved by this Court and by the Court of Appeals.

The Commission's basic findings in its original decision remain unchanged in its decision on remand. These basic findings, as stated by the Court of Appeals in its prior decision are:

> "(1) Existing telegraph facilities (cable plus radio) are in excess of those required to handle present and expected traffic.
>
> "(2) Mackay's proposed operations will redistribute present traffic rather than generate any appreciable amount of new traffic.
>
> "(3) 'It does not appear that Mackay's proposed service to each of the points at issue will result in lower rates or speedier service, or will otherwise be superior to or more comprehensive than the service now available via RCAC.'
>
> "(4) There is some possibility that Mackay will need additional frequencies, for Netherlands traffic, to provide continuous service throughout the eleven-year sunspot cycle.
>
> "(5) Both Mackay's revenue and its expenses will be increased, but the net result will be financially beneficial to Mackay and to the AC&R system of which it is a part.
>
> "(6) The revenue of other carriers will be reduced, but their expenses will not.
>
> "(7) 'When the over-all effect of a grant of the applications is considered, it appears that the added costs which might result on an industry-wide basis will be relatively small so that the impact on the rate structure as a whole should not be substantial.'
>
> "(8) Mackay is technically, financially and legally qualified and able to render adequate service.
>
> "(9) There is 'at present active competition not only between cable carriers and between cable and

radiotelegraph carriers serving the points at issue, but also between such telegraph service provided by these carriers and the airmail and the radiotelephone services.'

". . . (10) [Granting Mackay's application] will 'not endanger the ability of RCAC and Western Union to continue to provide competitive service either to the points at issue or, generally, in the field of international telegraph communications';

"(11) 'while resulting in some decrease in cable competition, will increase over-all competition for telegraph traffic generally . . .'; and

"(12) will 'introduce competition between direct radiotelegraph circuits' and consequently 'more effective competition between radiotelegraph carriers'. The 'ability of a carrier to provide direct communication service is an important factor in appealing for customer patronage . . .'" 91 App. D. C. 289, 201 F. 2d 694, 696.

The Court of Appeals, despite the foregoing findings, sustained the decision of the Commission on remand, stating as follows:

". . . the Commission's decision on remand would appear to make it clear that it has not placed its reliance upon an imagined national policy favoring competition but, instead, has acted in accordance with its own best judgment; that it has brought its experience to bear throughout; and that it has bolstered its conclusions with factual data the great weight of which is consonant with the result." (Appendix B, p. 88).

In essence, the Commission and the Court of Appeals ignored the foregoing basic findings and on remand relied on a finding based on unidentified and unspecified experience to the effect that (a) there has been competition in

international common carrier communication by radiotelegraph, including competition to the two points here involved, and (b) that in the presence of competition there have also been plant additions, improvements in service, and rate reductions. This is said by the Commission and the Court of Appeals to justify the conclusion that duplicative circuits to The Netherlands and to Portugal should be granted in the public interest, and that the requirements of this Court's opinion have been satisfied.

The total lack of causal relationship between competition and the improvements in service relied upon is most cogently set forth in the dissenting opinion of Commissioner Webster:

> ". . . I am greatly troubled by the majority's decision to grant Mackay's applications, not only because I disagree so emphatically with the conclusion which it has reached, but also because I am unable to obtain a clear understanding of the reasoning upon which the conclusion is based, as I find it vague as well as factually unsupported.
>
> "However, from what I could gather from the decision, the majority bases its grant of the Mackay applications primarily upon what it believes to be benefits which have resulted from the existence of competition between direct radiotelegraph circuits in the field of international telegraph communications. That the majority does not point to specific results from such competition is worthy of particular note. Instead, it enumerates various improvements which have occurred in the *overall* service and points to certain rate reductions which were instituted some *ten years ago* primarily by Mackay and RCAC. The majority thus assumes that the improvement in facilities and services and such rate reductions were caused primarily by the existence of competition in direct radiotelegraph circuits primarily

between the applicant, Mackay, and RCAC. In other words, the majority deduces a causal relationship from the existence of two separate factors: i.e., direct radiotelegraph circuit competition and the above described benefits. I do not believe that the majority has demonstrated that the competition resulted in the improvements; nor do I believe that the evidence of record would support or justify conclusions that the causal relationship did in fact exist." [Appendix A, p. 76.]

Reasons for Granting the Writ.

1. This Court originally granted certiorari "because this case, the first in which the grant of duplicate radiotelegraph circuits has been challenged in the courts, presents an issue of primary importance in authorization, under the Federal Communications Act of 1934, of international radiotelegraph circuits." 346 U. S. at 89. In addition, the case now presents the additional important question as to whether the Commission and the Court of Appeals have correctly interpreted this Court's previous opinion as requiring from the Commission a mere bow to verbiage. Further, the Commission's decision and the decision of the Court of Appeals raises the issue as to the extent to which unidentified and unspecified experience can be relied on by the administrative agency as the basis for decision.

Examination of the Decision on Remand demonstrates that a bare majority (4-3) of the Commission has repeated the abstract and sterile finding on the effect of competition rejected by this Court.

The basic error of the Commission is nowhere better illustrated than by a comparison of the finding on the effect of competition rejected by this Court and the finding in the

decision on remand on the effect of competition on the making of new capital investments.

The Finding Rejected by this Court

"The Commission stated in its opinion: 'Competition can generally be expected to provide a powerful incentive for the rendition of better service at lower cost. Those seeking the patronage of customers are spurred on to install the latest developments in the art in order to improve their services or products, and in order to enable them to reduce expenses and thereby lower their rates or prices. The benefits to be derived from competition should, therefore, not be lightly discarded.' R. 623. 346 U. S. at 94 n. 6.

The Finding in the Decision on Remand

"Although it may be incorrect to say that such competition was the sole cause impelling each company to make these investments [referring to additional plant investments on duplicative circuits], our experience in this field lead us to the conclusion that it would be unrealistic to assume that such plant additions and improvements would have been made to the same extent as actually were made, in the absence of competition. Instead, our experience leads us to conclude that the existence of competition between RCAC and Mackay was an important factor in inducing each to make such plant improvements" (DR 39).

". . . we feel that the threat of possible competition to such points [where duplicative circuits were non-existent] was a factor impelling the decision to extend such improvements, as well as the new services, and rate reductions to such points" (DR 39 n. 1).

This Court's observation in rejecting the Commission's original finding on the effect of competition is equally applicable to the Commission's finding in its decision on remand:

> "Surely one cannot conclude from this bare statement that the Commission, whatever undisclosed awareness it may have of the problem, has sufficiently laid bare its mind to enable us to perform a reviewing function . . ." (346 U. S. at 94 n. 6).

This Court did not intend, in its prior decision, to permit the Commission merely to substitute for a recitation of its evaluation of a national policy in favor of competition, a conclusory recital of experience unsupported by the record of the Commission's past actions.

This Court did not intend that the Commission pay only lip service to the decisional requirements of this Court and to then "warrant" or conclude that a "reasonable expectation" existed on the basis of some unspecified and unidentified experience which does not in some stated way relate competition with improved service to the public. The Court, it is submitted, demanded more persuasive evidence than this.

It cannot be argued that this Commission may warrant the anticipated or past effect of competition where such warranty rests on its experience without laying bare that experience on the record. Without such exposure judicial review is impossible. See *e.g. Secretary of Agriculture* v. *United States*, 350 U. S. 162 (1956); *United States* v. *Baltimore & Ohio Railroad*, 293 U. S. 454 (1935).

This must be so in this case where the Commission had more than two years experience with the operation of the very circuits involved in this case. See *United Airlines, Inc.* v. *CAB*, 81 App. D. C. 89, 155 F. 2d 169, 174 (1946).

The two findings quoted above and the others to which reference is made demonstrate beyond any doubt that all

the Commission actually has done is to find the existence of competition and the "presence of" improvements. (R. 952; DR 29, 31, 38, 58, 66) No causal relationship or likelihood of such relationship has been demonstrated by the Commission nor has any pretense been made of the existence of such a relationship.

An administrative order with nothing more than this as a basis cannot stand.

The Court of Appeals has recently stated, relying on the pronouncements of this Court, the extent to which the experience or expertise of a Commission may be relied upon as a basis for decision:

> "The decisions require a commission in a quasi-judicial proceeding to make basic findings supported by evidence and ultimate findings which flow rationally from the basic findings—this in order that the commission shall itself perform the initial function of evaluating the evidence and deciding the issues of fact, and in order that the courts, as reviewing tribunals, can decide whether or not the ultimate decision reached by the commission follows as a matter of law from the facts found as its basis, and also whether or not the facts found have substantial support in the evidence. The 'expertise' of a commission usefully serves it in evaluating the evidence but that expertise cannot supply evidence and can not, without findings made upon the critical issues before it, guide a commission to a rational and lawful decision." *Capital Transit Co.* v. *Public Utilities Commission*, 93 App. D. C. 194, 213 F. 2d 176, 187 (D. C. Cir. 1953), *cert. den.*, 348 U. S. 816 (1954).

The vice in the Commission's approach to the decision of this Court is best illustrated by a review of the Commission's own pronouncements in the past on the effect of competition. The Commission uniformly, until it issued the Order in this case, denied applications for duplicative circuits in every case where a hearing was held. The basis

for these denials was that no benefit to the public would result in the form of improved service or lower rates. See, *e.g., Press Wireless, Inc.*, 13 F. C. C. 817 (1949); *Mackay Radio & Telegraph Co., Inc.*, 12 F. C. C. 478 (1947); *Postal Telegraph-Cable Company*, 9 F. C. C. 271 (1943). See also *Mackay Radio and Telegraph Company, Inc.* v. *Federal Communications Commission*, 68 App. D. C. 336, 97 F. 2d 641 (1938).

2. RCAC respectfully submits that the competition created by the duplicative Mackay radiotelegraph circuit to Portugal is not even "reasonably feasible". When the grant of the additional Mackay circuit creates a situation where both the RCAC circuit and the Mackay circuit must be operated at a loss, the grant of the additional circuit cannot be in the public interest [DR 86-89].

Perhaps the closest analogy is the situation where unprofitable branch operations of a common carrier have been allowed to be discontinued as long as adequate substitutes were available. *Ann Arbor R. Co.* v. *Michigan Public Service Commission*, 91 F. Supp. 668 (E. D. Mich. 1950), *Chicago B. & Q. R. Co.* v. *Illinois Commerce Commission*, 82 F. Supp. 368 (N. D. Ill. 1949); *Atlantic Coastline R. Co.* v. *Public Service Commission of South Carolina*, 77 F. Supp. 675 (E. D. S. C. 1948). See *Chesapeake & Ohio Railroad Co.* v. *Public Service Commission of Virginia*, 242 U. S. 603 (1917).

The profitability of the overall operations of a carrier is to be considered only when public interest requires the continued operation of a branch. There is no such question here involved and, accordingly, the Commission was not entitled to take into account RCAC's overall operations or its operations on any other circuit in determining whether or not competition created by an additional unprofitable circuit to Portugal was "reasonably feasible."

Conclusion.

The decision below misapplies the mandate of this Court remanding the case to the Commission thereby misapplying the applicable provisions of the Communications Act of 1934, and it involves a question of federal law of far-reaching importance. It is respectfully submitted that the petition for certiorari be granted.

Respectfully submitted,

JOHN T. CAHILL,
Attorney for Petitioner,
63 Wall Street,
New York 5, N. Y.

JOHN W. NIELDS,
LAWRENCE J. McKAY,
HOWARD R. HAWKINS,
THOMAS W. HILL, JR.,
Of Counsel.

Appendix A.

Decision on Remand FCC 55-699
19914

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON 25, D. C.

IN THE MATTER *of* MACKAY RADIO AND TELEGRAPH COMPANY, INC., Applications for radiotelegraph circuits between the United States and Portugal, Surinam, and The Netherlands.	Docket No. 8777

APPEARANCES

JAMES A. KENNEDY and JOHN F. GIBBONS, on behalf of Mackay Radio and Telegraph Company, Inc., All America Cables and Radio, Inc., and the Commercial Cable Company; HOWARD R. HAWKINS, LEONARD W. TUFT, and FREDERICK M. PORTER, on behalf of RCA Communications, Inc.; JOHN H. WATERS, WILLIAM WENDT, and WILLIAM E. SEWARD, on behalf of The Western Union Telegraph Company; ASHER H. ENDE and ABBOTT C. ROSEMAN, on behalf of the Federal Communications Commission.

DECISION ON REMAND

By the Commission: Commissioners Webster, Bartley and Doerfer dissenting and issuing statements.

Preliminary Statement

1. *History of the Proceedings.* During 1946 and 1947, Mackay Radio and Telegraph Company, Inc., (Mackay), filed applications with the Commission for modification of its radio license at Brentwood, Long Island, New York, as well as for special temporary authorizations, to permit the establishment of direct radiotelegraph circuits between the United States, on the one hand, and Finland, The Netherlands, Portugal, and Surinam, on the other hand; and to permit the establishment of a radiotelegraph circuit between the United States and The Netherlands via its relay station at Tangier. Subsequently, on petition by Mackay, the application with respect to Finland was dismissed without prejudice on March 3, 1948.

2. Hearings were held on the remaining applications from April to June, 1948. The parties of record were Mackay; RCA Communications, Inc., (RCAC); and The Western Union Telegraph Company (Western Union). Both RCAC and Western Union opposed a grant of the Mackay applications.

3. On February 23, 1951, the Commission released its final decision in the matter, with two Commissioners dissenting, concluding that the public interest, convenience, and necessity would be served by a grant of the applications for direct radiotelegraph circuits to The Netherlands and Portugal and a circuit to The Netherlands via Tangier, but would not be served by a grant of the application for a direct radiotelegraph circuit to Surinam.[1] The Commission accordingly granted the applications insofar as they requested authority to serve The Netherlands and Portugal,

---

[1] An initial decision looking to a similar result had been issued on July 29, 1949, by then Commissioner Robert F. Jones, who had presided at the hearings.

and denied them insofar as they requested authority to serve Surinam.[2]

4. RCAC appealed the Commission's decision to the United States Court of Appeals for the District of Columbia Circuit, under Sections 402(b) and 402(c) of the Communications Act of 1934, as amended. That court denied RCAC's request for a stay of the effectiveness of the Commission's decision pending appeal, and Mackay accordingly initiated service to The Netherlands via Tangier on June 19, 1951, and to Portugal on March 12, 1951. However, after hearing oral argument, the court reversed the Commission's decision by opinion and order of November 6, 1952. *RCA Communications, Inc.* v. *Federal Communications Commission*, 201 F. 2d 694 (D. C. Cir. 1952).

5. On December 5, 1952, the court of appeals granted motions of both Mackay and the Commission to stay certification of its opinion and order, to permit such parties to petition the United States Supreme Court for writs of certiorari for review of the court's opinion and order. Certiorari was granted March 9, 1953, and the case was argued before the Supreme Court on April 29 and 30, 1953.

6. The Supreme Court rendered its opinion on June 8, 1953, reversing the judgment of the court of appeals and remanding the case to that court with instructions to further remand it to the Commission for such disposition as was open under the Supreme Court opinion. *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U. S. 86 (1953). The court of appeals remanded the case to the Commission by order of July 30, 1953.

7. On August 3, 1953, Mackay filed a petition with the Commission requesting that the Commission's decision of

[2] The requested special temporary authorizations were dismissed as moot with respect to The Netherlands and Portugal, and denied with respect to Surinam.

February 23, 1951, be reconsidered, redetermined, and clarified; that new and supplemental findings be made as the petition suggested; and that the grant of The Netherlands and Portugal applications be reaffirmed, RCAC filed an answer to the petition on August 13, 1953, wherein it requested that such circuits be terminated as not serving the public interest, convenience, or necessity. A reply was filed by Mackay on August 24, 1953.

8. The Commission, deciding that oral argument by the parties would be helpful in determining the disposition to be made of the matter, heard argument on February 8, 1954. After this, the Commission, by order released March 3, 1954, ordered further hearings for the purpose of bringing the record up-to-date so that it might consider current data in arriving at a decision in conformity with the standards prescribed by the Supreme Court. Mackay, RCAC, Western Union, The Commercial Cable Company (Commercial), and All America Cables and Radio, Inc., (All America)[1] were named parties respondent. The Commission ordered that the Hearing Examiner certify the record to the Commission without preparing an initial or recommended decision.

9. A prehearing conference was held on March 11, and hearings were held on April 7-8, 12-16, 20, and May 3, 1954. Proposed findings of fact and conclusions were filed by both Mackay and RCAC on June 7, 1954, and a statement was filed on that date by Western Union.

10. The Hearing Examiner certified the record to the Commission for decision on June 21, 1954. The entire record now consists of 4510 pages of transcript of testimony and 297 exhibits.

---

[1] Mackay, Commercial, and All America are owned and controlled by American Cable and Radio Corporation (AC&R). The three companies will at times be referred to herein as the AC&R companies, or the AC&R system.

Need for Final Decision

11. The applications herein were filed more than eight years ago. Since that time we have held lengthy proceedings and at present have before us an extensive record which includes the original transcript of testimony, exhibits, and pleadings, as well as oral argument, prior to our decision of February 23, 1951. In addition, we have the benefit of pleadings filed by Mackay and RCAC subsequent to the remand of this proceeding to us, oral argument by both these parties, and a transcript of testimony and the exhibits adduced at the further hearings, as well as proposed finding and conclusions submitted by the parties.

12. In view of all the foregoing, namely, the long lapse of time, the detailed and voluminous data, the extensive pleadings and arguments which furnish us with a detailed analysis of all phases of the issues involved, and the importance of resolving the matters at issue as quickly as possible, we are of the opinion that this matter should now be resolved without further delay, and that the due and timely execution of our functions imperatively and unavoidably requires the issuance, at this time, of a final decision. Accordingly, we are omitting a further initial decision and are instead issuing this final decision.[1] It is to be noted that any party to the proceeding may apply for rehearing pursuant to the provisions of Section 405 of the Communications Act of 1934, as amended, and the applicable Rules.

Basic Problems

13. This matter is again before us, on remand by the Court of Appeals for the District of Columbia Circuit, for such disposition as may be open under the opinion of the Supreme Court.[2] In its opinion, the Supreme Court held

---

[1] See Administrative Procedure Act, Sec. 8, 60 Stat. 242 (1946), 5 U. S. C. Sec. 1007 (1952).

[2] *F. C. C.* v. *RCA Communications, Inc.*, 346 U. S. 86 (1953).

that the Commission could not conclude that "national policy [favoring competition] without more suffices for authorization of a competing carrier wherever competition is reasonably feasible. . . ." To do so, the Court said, "would authorize the Commission to abdicate what would seem to us one of the primary duties imposed on it by Congress," because "the conclusion was not based on the Commission's own judgment but rather on the unjustified assumption that it was Congress' judgment that such authorizations are desirable."[3] The Supreme Court, therefore, stated that:

"[S]ince we read the opinion of the Commission as saying precisely that, we think the case must be remanded for its reconsideration."[4]

14. The Supreme Court, however, made it very clear that the Commission may give consideration to the possible benefits of competition. It stated:

> Of course, the fact that there is substantial regulation does not preclude the regulatory agency from drawing on competition for complementary or auxiliary support. Satisfactory accommodation of the peculiarities of individual industries to the demands of the public interest necessarily requires in each case a blend of private forces and public intervention. . . . There can be no doubt that competition is a relevant factor in weighing the public interest.[5]

15. The Court further held:[6]

> We therefore do not say that authorization of Mackay under all the relevant circumstances, including the significance the Commission may rightly attribute to the facts on the basis of its experience, may not be in the

[3] *Id.*, at 95-96.

[4] *Ibid.*

[5] *Id.*, at 93-94.

[6] *Id.*, at 95-96.

public interest.* We think it not inadmissible for the Commission, when it makes manifest that in so doing it is conscientiously exercising the discretion given it by Congress, to reach a conclusion whereby authorizations would be granted wherever competition is reasonably feasible. This is so precisely because the exercise of its functions gives it accumulating insight not vouchsafed to courts dealing episodically with the practical problems involved in such determination.

16. Finally, the Court stated:[1]

> In reaching a conclusion that duplicating authorizations are in the public interest wherever competition is reasonably feasible, the Commission is not required to make specific findings of tangible benefit. It is not required to grant authorizations only if there is a demonstration of facts indicating immediate benefit to the public. To restrict the Commission's action to cases

---

* We need not stop to consider RCAC's argument that a prior decision of the Commission, the so-called *Oslo* decision, affirmed by the Court of Appeals for the District of Columbia Circuit, stands in the way. *Mackay Radio & Tel. Co.* v. *F. C. C.*, 68 App. D. C. 336, 97 F. 2d 641. Although in that case the facts were similar to those here, the Commission there decided that duplicate facilities should not be authorized. In affirming, the Court of Appeals simply affirmed that competition is not necessarily in the public interest, not that it is never in the public interest. The Court stated: "Appellant contends that the Commission committed error of law in failing to interpret 'public convenience, interest or necessity' as necessarily requiring the licensing of a competing radio circuit to Norway so as to end what appellant describes as the monopoly of RCAC" 68 App. D. C., at 337, 97 F. 2d, at 642. It concluded, "in our opinion, the Commission did not err as matter of law in refusing to treat 'public interest, convenience or necessity' as requiring, by definition, the licensing of appellant." 68 App. D. C., at 339, 97 F. 2d, at 644. We think the precise holding of that case rather supports our conclusion in this case. See Prettyman, J., dissenting below, 91 U. S. App. D. C., at 294, 295, 201 F. 2d, at 699, 700.

[1] *Id.*, at 96-97.

in which tangible evidence appropriate for judicial determination is available would disregard a major reason for the creation of administrative agencies, better equipped as they are for weighing intangibles "by specialization, by insight gained through experience, and by more flexible procedure." *Far East Conf.* v. *United States*, 342 U. S. 570, 575. In the nature of things, the possible benefits of competition do not lend themselves to detailed forecast, cf. *Labor Board* v. *Seven-Up Co.*, 344 U. S. 344, 348, but the Commission must at least warrant, as it were, that competition would serve some beneficial purpose such as maintaining good service and improving it. Although we think RCAC's contention that an applicant must demonstrate tangible benefits is asking too much, it is not too much to ask that there be ground for reasonable expectation that competition may have some beneficial effect. Merely to assume that competition is bound to be of advantage, in an industry so regulated and so largely closed as is this one, is not enough.

17. We must therefore consider the evidence adduced at both the original hearings and the further hearings, as well as all of the pleadings filed and arguments advanced by the parties to this proceeding, in the light of the criteria set forth in the Supreme Court decision. If on the basis of such consideration and after evaluating the needs of the industry, as well as bringing to bear the insight gained through long experience in the field, we find that there is "ground for reasonable expectation that competition may have some beneficial effect," we may reaffirm our grant. If we cannot reach at least such a conclusion, we must deny the Mackay applications.

Background

18. *Competitive Situation in 1934.* The Commission has had ample opportunity to observe and evaluate the effects of competition in the field of international telegraph com-

munications. In 1934, when the Commission was established, international telegraph service was provided by ten radiotelegraph carriers (or predecessors): Mackay and RCAC, both of which operated circuits to all areas of the world; Globe Wireless Ltd., Hearst Radio, Inc., South Porto Rico Sugar Company, Southern Radio Company, Tropical Radio Telegraph Company, United States-Liberia Radio Corporation, and the Government of Puerto Rico, each of which provided service to particular areas of the world; and Press Wireless, Inc., which provided service for press and public information entities. In addition, at that time, cable telegraph service between the United States and its possessions and overseas points was provided by Western Union, Commercial, All America, Commercial Pacific Cable Company, French Cable Telegraph Company, and Cable & Wireless, Ltd.[1] With the exception of Commercial Pacific, Hearst Radio, Southern Radio, and the Government of Puerto Rico, all of the above companies were providing international telegraph service when the record in this proceeding was closed. In addition to the international telegraph carriers, the international telephone service provided by the American Telephone and Telegraph Company and the international mail facilities of the United States Post Office Department also compete for the patronage of users of international communications facilities.

19. However, we are here concerned primarily with the effects on the public of competition resulting from duplicate direct circuits operated by competing radiotelegraph carriers, rather than effects resulting from other forms of competition between international communications carriers, including telephone and air mail. Although we recognize the difficulty in making precise measurements of the effects of competition, we believe that the data set forth below, viewed through the perspective of the Commission's twenty years of intimate experience in this field,

[1] This does not include the Mexican Telegraph Company which then operated cables to Mexico only. This company is no longer operating.

enable us competently to assess and evaluate both the effects and desirability of competition between radiotelegraph carriers operating competing direct circuits.

Growing Importance of Radio

20. We note first that in the years since 1936 there has been a decided shift from cable to radio in the volume of United States international message telegraph traffic. In 1936 the cable carriers handled more than 70% of the total message traffic, in words, accounting for 76.2% of the total outbound traffic and 64.9% of the total inbound traffic. However, we find that in 1953 the radiotelegraph carriers transmitted 52.3% of all United States traffic, handling 49.3% of the outbound and 55.4% of the inbound message traffic. An important factor responsible for such shift is found in the desire of many foreign administrations, including those of the points at issue, to develop radiotelegraph traffic, from which they derive greater revenue than from cable traffic. An additional factor was the authorization of numerous direct radiotelegraph circuits, as set forth below, to points not served directly by cable.

Natural Or Economic Monopoly

21. The international radiotelegraph industry does not have characteristics normally found in a natural or economic monopoly. It is possible in this industry to establish a relatively inexpensive plant to serve one or a small number of points, as has been done, for example, by the United States-Liberia Radio Corporation and Globe Wireless Ltd. These companies had respective gross plants of $83,582 and $504,395, and respective net plants of $16,928 and $163,640, at the end of 1953, which they used to operate direct circuits to one and four points, respectively. Natural or economic monopolies, on the other hand, by their nature usually require an initially very heavy plant investment in order to provide any service at all, and as a result their

initial plants are capable of serving a major share of the market. We also note that in the international radiotelegraph field annual revenues are almost one and one-half times net book cost of plant, in contrast to a natural or economic monopoly, where annual revenues are normally a fraction of plant investment.

Competition Between Duplicate Direct Circuits

22. Both Mackay and RCAC, the two major United States radiotelegraph carriers, have been providing service to numerous foreign and overseas points for many years. At the time the Commission was created, on July 11, 1934, Mackay operated direct circuits to 12 points and had been authorized to establish direct communications service to 8 others, while RCAC operated directly to 35 points and had been authorized to communicate directly with 13 others. Mackay and RCAC operated competing circuits to 7 points, and if each had opened service on all circuits it had been authorized to operate, they would have competed to 17 points. If we consider all United States radiotelegraph carriers, we find a total number of 107 authorized circuits, of which 65 were in actual operation. Of those in actual operation, there were two or more competing circuits to 11 points, while if we include circuits authorized but not in operation, we find that 21 additional points were authorized two or more competing circuits, making a total of 32 points to which competing circuits were authorized. Of these, 19 had two authorized carriers; 9 had three authorized carriers; 3 had four authorized carriers; and 1 had five authorized carriers.

23. From 1934 to 1939, the Commission generally denied applications for establishment of additional direct radiotelegraph circuits to countries already served by the facilities of another United States radiotelegraph carrier. The Commission did, however, renew the authorizations of carriers which had theretofore operated competing direct radiotelegraph circuits. Thus, while additional competition

was generally not authorized, the aforementioned extensive existing competition between direct radiotelegraph circuits was continued. Between 1939 and 1942, the Commission generally granted applications for new circuits, without regard to the question of whether the points involved were already served by an existing radiotelegraph carrier. From 1942 to 1943, at the behest of the Defense Communications Board, as a war measure the Commission followed an affirmative policy of authorizing duplicating circuits to foreign and overseas points. During the period from 1939 to 1943, the Commission granted authorizations for carriers to operate duplicate radiotelegraph circuits to 41 countries.[1] From 1943 to 1945, again as a war measure instituted at the request of the Board of War Communications (successor to the Defense Communications Board), the Commission followed a reverse policy and generally denied applications for duplicate circuits. During this period eleven applications for duplicate circuits were denied.

24. From 1945 until the present proceeding was first decided in 1951, the Commission granted a number of duplicating circuits.[2] In addition, the Commission authorized the resumption of service over duplicate circuits to countries which had been enemy-occupied during World War II. Since the Commission's original decision herein, the Commission has granted certain applications for duplicate circuits[3] and has designated others for hearing.[4] Finally, we

---

[1] This amount includes 24 authorizations for duplicate circuits which were never opened for operation.

[2] These included authorizations to serve such places as France and Germany.

[3] The RCAC application for a duplicate circuit to India was granted by memorandum opinion and order adopted June 6, 1951, and Tropical Radio Telegraph Company's application for a duplicate circuit with El Salvador was granted by Commission order adopted July 18, 1951.

[4] Mackay applications for duplicate circuits with Puerto Rico and Turkey were set for hearing in Dockets Nos. 10056 and 10360, respectively.

note that the Commission has renewed outstanding duplicate circuit authorizations from time to time as the licenses expired.

25. At the time the record was closed in the further proceedings herein, Mackay was authorized to serve 38 points (excluding one emergency circuit), and had circuits to 37 points in actual operation. RCAC was authorized to 65 points, and was actually operating to 64. These two companies were authorized and operated competing direct circuits[1] to 24 points.[2] The total authorized direct circuits for all United States carriers were 137, of which 133 were actually operated. Two duplicate circuits were authorized to 15 points; three were authorized for 12 points; four were authorized for 3 points; and five were authorized for 1 point; or a total of 31 points. Of those in operation, a total of 29 points had two or more circuits as follows: 14 points had two; 12 points had three; 2 points had four; and 1 point had five.

26. It will be, therefore, noted that the number of points served directly by both Mackay and RCAC increased from 7 in 1934 to 24 in 1954; while the total number of duplicated points for the United States radiotelegraph industry as a whole rose from 11 in 1934 to 29 in 1954.

---

[1] Circuits operated by relay via the stations of Mackay and RCAC at Tangier are included among the direct circuits herein and unless specifically indicated otherwise will be considered direct circuits herein.

[2] The points to which such competing circuits were operated included such important traffic points in Europe as England, France, Germany, Italy, and the Union of Soviet Socialist Republics. In Asia and Oceania, they included Hawaii, India, Japan and the Philippines; in Latin America, they included Argentina, Brazil, Colombia, Chile and Cuba. In addition, they also included relatively less important points traffic-wise, such as Austria, China, Czechoslovakia, Formosa, Bermuda, Dominican Republic, Egypt, Haiti, and Tangier. Mackay's circuits with The Netherlands and Portugal are excluded from the above totals.

Importance of Direct Circuits in the General Competitive Picture

27. Our experience in the field of international communications, which is substantiated by the data of record, indicates that the ability of a carrier to provide direct communications service is an important factor in soliciting for and securing customer patronage; that the operation of direct circuits tends to improve the carrier's ability to secure inbound traffic because the foreign administration generally attempts to transmit the maximum amount of traffic possible over such a direct circuit since it thereby retains a greater share of the tolls than if the traffic were handled over an indirect route; and that the handling of additional inbound traffic tends to develop additional outbound traffic and so further improve the carrier's competitive position. The importance which the various international carriers attach to direct circuits has been amply demonstrated by both the eagerness with which applications for such circuits are pressed and by the strenuous opposition expressed by companies already authorized to operate such circuits when confronted with applications for duplicate circuits. Accordingly, we are persuaded that competition by direct circuits is probably the most important factor in the general radiotelegraph competitive picture.

28. The Commission, as stated above, has before it a lengthy record of the operations of competing direct radiotelegraph services by the United States carriers and can assess the effects upon the industry of such competitive situation. We shall concentrate upon radiotelegraph competition between Mackay and RCAC, as these two carriers are the primary radio carriers engaged in such competition, as well as the two principal parties in this proceeding. These two carriers account for 87.7% of the total message volume (in words) handled by all radiotelegraph carriers in 1953 and 84.9% of all revenues received by radiotelegraph carriers in that year. They may therefore be con-

sidered fully representative of the industry. We shall then address our attention to the facts contained in the record with respect to competition between these two companies to the points at issue for the period from the institution of Mackay's service to such points until the close of the record.

Development of Mackay and RCAC in the Presence of Increasing Competition

29. The earliest year for which complete data with respect to message volume, revenues, earnings, and plant data are generally available from the record is 1938, and the latest such year is 1953. We shall, in general, make comparisons of such data between these two particular years and, where appropriate, use averages for the 16-year period.

30. *Message Volume.* As is set forth in Table I below, both Mackay and RCAC show a very great increase in the number of words[1] handled in 1953, as compared with 1938. Even more significantly, both carriers have increased their respective percentage shares of the total industry message traffic volume. As one might expect, Mackay, which was authorized to operate an increasing number of duplicate circuits, showed a greater relative increase. However, the increasing competition by Mackay did not prevent RCAC from making similar, though less dramatic, increases in its share of the traffic. While in 1938 RCAC handled slightly more than one word in five handled by the entire industry, by 1953 it was handling about three words in ten. In terms of absolute volume RCAC showed an increase of 93,000,000 words while Mackay showed an increase of 76,000,000 words. This was achieved despite Mackay's increasing competition and despite the opening by that company of competitive direct circuits to such important traffic countries as England, France, Germany, Italy, and the U. S. S. R.

[1] Since international message traffic is charged for by the word, comparisons are made on this basis.

TABLE I

U. S. International Traffic Volume, in Words, for Mackay and RCAC, and Their Respective Shares of the Industry Total, 1938 and 1953

(Thousands of Words)

	1938		1953	
	Words	% of Industry Total	Words	% of Industry Total
Mackay	7,850	3.0	83,874	16.4
RCAC	57,794	21.7	150,661	29.5

31. *Revenues.* As is set forth in Table II below, both Mackay and RCAC have also shown increases in their message revenues comparable to those discussed above with respect to message volume. Both Mackay and RCAC also substantially increased their relative shares of the industry's total revenues. RCAC's relative increase in terms of dollars realized from message traffic was greater than its increase in the share of words. In 1938, its share of the industry-message-revenue dollar was 17.5 cents, whereas by 1953 it was 30.5 cents. Total revenues showed a similar increase, both in terms of dollars and in the relative share of each of these carriers in the industry's total. These increases in total revenue shares reflect the delvelopment and growth of various non-message services provided the public. The nature and implication of these increases will be discussed in paragraphs below. At this point, it is sufficient to note that in the presence of such competition, both enjoyed sizeable increases in their relative shares of the industry revenues.

TABLE II

U. S. International Message Revenues and Total Revenues for Mackay and RCAC and Their Respective Shares of the Industry Total, 1938 and 1953

(Thousands of Dollars)

	1938		1953	
	Amount	% of Industry Total	Amount	% of Industry Total
Message Revenues:				
Mackay	$ 588	2.9	$ 6,166	15.8
RCAC	3,481	17.5	11,918	30.5
Total Revenues:				
Mackay	[a]$1,071	4.6	8,233	14.2
RCAC	[a] 4,837	20.7	16,106	27.7

[a] On the basis of reporting requirements in effect in 1953. Excludes revenues from continental transmission.

32. *Net Operating Income.* We shall now turn our attention to the earnings picture, which is the most important measure of both financial stability and ability to continue to provide improved service in the public interest. In an industry of this type, where traffic volume and revenues are subject to sizeable fluctuations and are affected by many factors and events outside the United States, net operating income and ratio thereof to net book cost of plant have necessarily varied from year to year. However, it appears that, for the entire sixteen-year period (1938 to 1953) under consideration, RCAC has enjoyed ample earnings. Its ratio of net operating income, after computed federal income and reported excess profits taxes, to average net book cost of plant for this period was 14.3%.[1] In the

[1] Average annual net operating income for the period, after computed federal income and reported excess profits taxes, was $1,132,000. The actual yearly figures ranged from a loss in one year only (1947), to a high of $1,991,000 in 1945. Average annual net book cost of plant was $7,922,000.

post-war period of 1946-1953, the average annual ratio was 7.8%.[1] This decline was caused, in part, by an increase in plant investment. Finally, in the three years (1951-1953) since Mackay opened its Netherlands and Portugal circuits, RCAC's average annual ratio was increased to 8.9% despite an increase of about 8% in net book cost.[2]

33. During the sixteen-year period from 1938 to 1953, as a whole, Mackay did not fare as well, but instead showed a reported net operating loss for the entire period[3]. When the post-war period of 1946-1953 is considered, Mackay also shows a reported net operating loss.[4] However, for the most recent period of 1951-1953, after a period of increasing competition by direct circuits (and, incidentally, during the period which Mackay was operating its circuits to The Netherlands and Portugal), a very considerable change took place. For this period, on the basis of reported net operating income, the ratio of net operating income, after computed federal income taxes, to net book cost of plant was 15.1%[5]

34. It is also interesting to note that the earned surplus account, which reflects the earnings retained by the carriers after payment of dividends, has shown a steady growth in the case of RCAC. At the beginning of 1946, the first post-war year, that company reported a balance in such account of $5,281,000. In the subsequent years this account

---

[1] Average annual net operating income for this period, after computed federal income and reported excess profits taxes, was $786,000. Average net book cost of plant was $10,047,000.

[2] Average annual net operating income for this period after computed federal income taxes was $963,000. Average net book cost of plant was $10,814,000.

[3] During the period Mackay suffered losses for eight separate years and showed net operating revenues in a like number of years.

[4] Losses were suffered in four separate years while in four separate years Mackay reported net operating revenues.

[5] Average annual net operating income after computed federal income taxes was $839,000. Average net book cost of plant was $5,545,000.

showed a constant increase, so that by the end of 1953 the retained earnings reached $11,097,000,[1] or more than twice the earlier figure. The ratio of RCAC's current assets to its current liabilities at the end of 1953 was 2.5 to 1. RCAC reported no long-term debt. Payables to affiliates, which include, at times, advances to RCAC from RCA, its parent company, were $141,000 at the end of 1953, as against a high of $3,606,000 at the end of 1947. There is no doubt that, despite the increasing Mackay competition, RCAC was in a very sound financial position at the end of 1953.

35. At the beginning of 1946, Mackay, after the profitable war years, reported a balance in its earned surplus account of $270,000. Thereafter, Mackay suffered losses in 1946 through 1949, which converted the surplus into a deficit. Beginning in 1950, it enjoyed net earnings which were sufficient to wipe out the accumulated deficit, so that by the end of 1953 it had $28,000 in its earned surplus account. While Mackay's retained earnings were relatively low, its earnings experience for the years 1950-1953 justifies the conclusion that it also is now in a relatively sound position, particularly in view of the facts that its ratio of current assets to current liabilities is almost 4 to 1 and that it had reduced its long term debt from a high of $5,900,000 at the end of 1950 to $3,800,000 at the end of 1953.

36. We recognize that the aforementioned RCAC ratio of 14.3% for net operating income after taxes to net book cost of plant during the period 1938-1953 includes unusually high earnings realized during World War II and, therefore, may not be fully representative of normal peace-time operations. We note, however, that for the post-war years, which were characterized by inflation, higher operating expenses, and heavy investments in new and more expensive plant, as well as substantial rate reductions during this

[1] This figure is after dividends of $1,500,000 paid for the years 1946 through 1953. In the period 1939 through 1953, RCAC paid a total of $7,550,000 in dividends.

period, the ratio was 7.8%. More significant is the increase to 8.9% in the 1951-1953 period, the most recent three years for which data are available in the record. This increase, amounting to 14% of the post-war average, was realized in face of the added Mackay competition to The Netherlands and Portugal, and during a time when this Commission did not authorize any increases in outbound rates. As noted above, Mackay likewise had a very substantial ratio for this latest period.

37. This is not a rate proceeding and we are not making findings as to the reasonableness of any return or ratio for that purpose. However, on the basis of our experience in this field, we are of the opinion that a ratio of 8.9%[1] for RCAC in the most recent three-year period indicates that RCAC is in a sound financial position. When we consider those earnings, together with the other financial data set forth above for Mackay and RCAC, we find that the existence of competition in direct radiotelegraph circuits is reasonably feasible.

Public Benefits With Presence of Increasing Competition

38. *General.* We shall now turn our attention to the data of record wth respect to the improvements made by RCAC and Mackay in equipment, facilities, and services, as well as the reductions in rates initiated by those companies, and determine the extent to which they have occurred, and whether the existence of competition in direct radiotelegraph circuits may be deemed responsible, at least in part, for such improvements and rate reductions.

---

[1] This 8.9% is not return on a rate base but a ratio of net operating income to net plant. It makes no allowance for material and supplies or for any cash-working capital requirements that might be allowed in a rate proceeding. On the other hand, this ratio is after all reported operating expenses, which in some instances may be questionable as proper expenses for rate-making purposes.

39. *Plant Investments.* The record shows that both RCAC and Mackay have made extensive investments in plant from 1938 to 1953. During such period, RCAC invested $13,632,000 in new and improved plant, of which sum $11,321,000 was expended in the post-war years. In addition, RCAC testified that it had spent some $3,400,000 since 1946 for research, development, and use of new inventions. In the same period (1938-1953), Mackay invested $8,528,000 in improvements and additions to plant. Of this sum, $6,471,000 was invested in the post-war years. The period during which these sums were invested by Mackay and RCAC was characterized by growing competition between the two companies. Although it may be incorrect to say that such competition was the sole cause impelling each company to make these investments, our experience in this field leads us to the conclusion that it would be unrealistic to assume that such plant additions and improvements would have been made to the same extent as actually were made, in the absence of competition. Instead, our experience leads us to conclude that the existence of competition between RCAC and Mackay was an important factor in inducing each to make such plant improvements. These improvements, of course, result in public benefit by enabling the carriers to provide new services, to improve and expand existing service, and to reduce costs so as to provide a basis for rate reductions.[1]

40. *Equipment and Facilities.* The record shows that the aforementioned investments have resulted in improvements in the over-all plant equipment and facilities of Mackay and RCAC. Both have added transmitting and receiving equipment of more modern design and greater capacity. Central office facilities have been modernized and traffic handling procedures have been improved.

[1] Insofar as improvements, new services, and rate reductions were applied to non-duplicated circuits, we feel that the threat of possible competition to such points was a factor impelling the decision to extend such improvements, as well as the new services, and rate reductions to such points.

41. The record contains voluminous details with respect to the improvements made. In connection therewith, we note that, among other things, both Mackay and RCAC have developed different types of equipment to handle their respective traffic volumes. Mackay has developed a "polyplex" system in the interest of frequency conservation and is now testing a new system which it claims will require only one-quarter of the bandwidth per channel required by "polyplex". RCAC, on the other hand, has developed frequency-division and time-division multi-channel systems and has also developed an all-electronic multi-channel system. It also has a new single side-band frequency transmitting system and an arrangement called simulated single side-band which allegedly effects substantial economies over normal single side-band systems. RCAC also has put to use an ARQ system which rejects imperfect signals and automatically effects retransmission until signals are received perfectly, as well as other improved equipment.

42. We believe that the development and operation of different systems of transmission are distinctly in the public interest. It appears that the two companies each put forth their best efforts to develop and install that equipment which will enable them to serve the public better, or at lower cost. It is not necessary for us to determine which of the two ultimately will prove superior in order to support a finding that competition in direct radiotelegraph circuits furnished at least part of the impetus for the development of the two systems, and thereby serves a beneficial purpose in the international telegraph field.

43. *Services.* The record shows that in the post-war years, a time during which competition between Mackay and RCAC over direct radiotelegraph circuits was being intensified, various non-message services were introduced, primarily by RCAC. At the time the record was closed, RCAC was providing the following services, in addition to regular message service:

(a) Overseas Teleprinter Exchange Service (TEX),[1] which in 1953 resulted in $650,819 in revenues;

(b) Leased channel service, which in 1953 resulted in $781,595 in revenues; and

(c) Radiophoto service, conference service, addressed program, and scheduled press transmission and reception services, all of which in 1953 resulted in $416,458 in revenues.

44. At the time the record was closed, Mackay provided the following services, in addition to regular message service:

(a) Scheduled transmission, which in 1953 resulted in $253,876 of revenues;[2]

(b) Leased channel service, which in 1953 resulted in $285,279 in revenues; and

(c) Radiophoto service, which in 1953 resulted in $188 in revenues.

45. These non-message services are becoming increasingly important to the public and therefore as a source of revenue to Mackay and RCAC. In 1953, these services provided 6.5% and 11.5% of the total operating revenues of Mackay and RCAC, respectively, whereas five years before, in 1949, they provided only 4.0% of Mackay's and RCAC's total operating revenues, respectively. There can be no doubt that these services resulted from developments in the art designed to meet the needs of users. Here, too, it appears to us that increasing competition for radiotele-

[1] TEX is defined as two-way overseas telegraph communications between teleprinter stations in the continental United States and teleprinter stations located at overseas points. The facilities of RCAC are furnished to customers for direct exchange of telegraph dispatches with the parties called on an alternate rather than a simultaneous basis.

[2] Includes a minor amount for international Telex service with Hawaii.

graph customer patronage gave impetus to their creation as new and improved means of meeting the needs of the public and attracting business to the offering carrier, and that the spur of this competition was an important factor in their spectacular development in the few years since they were inaugurated.

46. *Rates.* When charges per full-rate word for traffic outbound from the United States in 1953 are compared with similar rates for 1936, it appears that substantial reductions have taken place in charges to most places in the world.[1] According to the data of record for this period, rates were decreased to some sixty-two points in the world, whereas they were increased to only two places. Many of the decreases were substantial in size. In fourteen instances, the net decrease[2] was fifty per cent or more; in twenty-nine instances, it was between twenty-five per cent and fifty per cent; in twelve instances, it was between ten and twenty-five per cent; and in only seven instances was it less than ten per cent. It is interesting to note that

[1] It should be noted that certain changes were made in the rate structure as a result of the changes adopted in the 1949 revision of the International Telegraph Regulations (T. I. A. S. No. 2175), effective July 1, 1950, to which the United States is a party. Thus, rates for full-rate messages were reduced to 75% of their former level; at the same time reduced rates applicable to the code message category were discontinued so that such users now pay the new full rates for such messages. In addition, the deferred category was abolished and the coefficient for letter telegrams was raised from one-third of the former rate for full-rate messages to 50% of the new rate for full-rate messages. It appears that these changes resulted in increased revenues to the carriers and therefore were in essence indirect rate increases. However, insofar as the persons sending ordinary full-rate messages are concerned, the comparisions are accurate.

[2] These decreases are net decreases and are after due allowance for four rate increases authorized by the Commission after the aforementioned reductions. See Charges for Communications Service, 12 F. C. C. 29 (1947); modified on rehearing, 12 F. C. C. 926 (1948); further modified on rehearing, F. C. C. Release No. 49-90, January 26, 1949; further modified on rehearing, F. C. C. Release No. 50-162, January 30, 1950.

Mackay and RCAC themselves instituted almost ninety per cent of all such decreases.

47. It appears to us that, while competition in the international telegraph field, generally, may have played a part in bringing about these rate decreases, the fact that almost all of them were instituted by RCAC or Mackay at a time when competition between them in direct circuits was increasing, indicates strongly that such competition was a major factor inducing them to institute such rate reductions. To the extent that competition, as it has in this instance, induces the carriers to institute rate reductions as a means of attracting more business, it results in very considerable public benefit. This is a concrete example of how competition, in the language of the Supreme Court, provides "complementary or auxiliary support" to the regulatory agency in the performance of its functions.

48. *Summary.* We have this far found that competition in direct radiotelegraph circuits is reasonably feasible between Mackay and RCAC, the two major competing radiotelegraph carriers. Each of them has increased its respective share of the industry message volume, message revenues, and total revenues. In addition, both carriers are in sound financial condition. RCAC has on the average enjoyed substantial earnings for the entire period since 1938 while Mackay has enjoyed similar earnings in recent years. Competition between direct radiotelegraph circuits has been an important factor in inducing the carriers to improve their plant facilities and services, to introduce new services, and to institute rate reduction for service to the public. Thus, competition in direct radiotelegraph circuits generally has resulted in public benefit.

The Two Applications at Issue

49. *General.* Thus far we have concentrated upon an examination and analysis of the forces at play in the international radiotelegraph industry in order to delineate the part that is played by the existence of competing direct

radio circuits, and their impact upon traffic volumes, revenues, investment, service, and rates. We must now determine whether the conclusions we have reached, as to the general feasibility of such competition and its over-all benefits, are applicable to the specific situation disclosed in the record with respect to The Netherlands and Portugal. If it appears to us that a continued operation of these two Mackay circuits is reasonably feasible and conducive to benefits of the type discussed above, we may, in conformance with the Supreme Court decision herein, reaffirm our grant. If we cannot so find, or if it appears to us that competition here has, or may have, adverse effects which outweigh its tendency to produce such benefits, we must, under the criteria set forth by the Supreme Court, deny the applications.

50. As has been set forth above, Mackay has been operating its circuit with The Netherlands since June 19, 1951, and its circuit with Portugal since March 12, 1951. We have, therefore, in addition to the evidence adduced at the original hearings, the benefit of data in the record of the further hearings with respect to actual operating experience, upon which to base our evaluation of the effects of competition with respect to these two circuits. We shall proceed to examine all the relevant evidence as well as the pleadings and arguments of the parties.

51. *Investment and Expenditures.* We have already found that the radiotelegraph industry is not a natural or economic monopoly. When we turn our attention to the applications now before us, we note that the additional competitive services can be, and in fact have been, provided with a negligible investment and very minor additional annual expenses. This is so because Mackay serves The Netherlands by relay via its existing facilities with Tangier. At Tangier it "forks" its operations to The Netherlands with those of other countries, principally the U. S. S. R., over already existing facilities. It serves Portugal on a "forked" basis with Spain and uses already existing

facilities for the most part. The record in the original hearings indicated that the investment related to such operations would involve at most a few thousand dollars as compared with a total net book cost of Mackay's plant of $5,676,000 at the end of 1953. The same is true with respect to additional annual expenses. It was estimated in the original record that additional annual expenses for the operations now conducted would be about $12,000. Even if due allowances are made for increased costs since then, it is clear that additional annual expenses attributable to such operations are less than ½ of 1 per cent of current annual operating expenses, which for 1953 totalled $6,883,000.

52. If Mackay were to operate a direct circuit to The Netherlands, instead via Tangier, it was estimated that the additional investment involved would be between $40,000 and $100,000, depending upon the type of equipment used. Such investment is again relatively minor when compared to the aforementioned net book cost of $5,676,000, ranging from 7/10 of 1 per cent on the basis of the lower figure, to 1.8 per cent on the basis of the higher figure. The operation of a direct circuit would also involve higher annual expenses for additional personnel, power, etc., as well as higher depreciation expenses because of the additional investment in plant. Even if it were to be assumed that such expenses would reach a total of $30,000 or $40,000 per year, they would still be less than 6/10 of 1 per cent of the 1953 operating expenses of $6,883,000.

53. *Volume of Traffic.* The record shows that The Netherlands is an important traffic center. In terms of traffic exchanged in 1953 with the United States (12,592,000 words), it ranked fifth in the area composed of Europe, Africa, and the Near East, being exceeded only by England, France, Germany, and Italy. Its world rank for 1953 was ninth in the more than 120 different foreign or overseas points.[1]

[1] Based on Order 85 data. Canada and Mexico are excluded.

54. There has been a considerable decline in the volume of traffic exchanged with Portugal since the close of the original hearings. Traffic exchanged with this country decreased from 5,161,000 words in 1947 to 2,248,000 in 1953. Nevertheless, Portugal still ranked 18th in its area and 39th (out of more than 120) in the world in 1953. Traffic exchanged with Portugal is still therefore relatively large when compared with most countries in the world.[1]

55. *Revenues.* Message traffic exchanged with The Netherlands accounts for considerable revenues. In 1953, the revenues accruing to the United States telegraph industry from this message traffic were $1,257,000 as against $748,000 in 1947, or an increase of 68 per cent. In the case of Portugal, revenues in 1953 were $138,000 as compared with $181,000 in 1947, or a decrease of 23.8 per cent.

56. It is to be noted that the volume exchanged between the United States and Portugal in 1953 and the revenues derived therefrom exceed the traffic between the United States and El Salvador and the revenues derived therefrom in 1950. (See paragraphs 91 and 92 below for a detailed comparison of these two points.) In the case of El Salvador, the Commission found, in its order of July 18, 1951, that "competition between carriers providing direct radiotelegraph service to El Salvador is reasonably feasible."

57. *Facilities, Practices, and Service.* In our original decision we found that Mackay was able to provide adequate telegraph service to The Netherlands and Portugal. The record shows that it has in fact provided such service since it opened its circuits. It further appears that Mackay, as well as the other carriers servicing The Netherlands and Portugal, has improved its equipment and facilities as well as its traffic handling practices. There has, for example, been no further evidence at the further hearings

[1] Based on Order 85 data. Canada and Mexico are excluded.

of complaints with respect to RCAC's service from its correspondents in The Netherlands and Portugal of the type that were introduced in the course of the original hearings.

58. In view of the foregoing, we find that the carriers servicing The Netherlands and Portugal, including Mackay, provide a fast and reliable service to each of these two points.[1] In addition, it appears to us that improvements made by a carrier in the presence of added competition by another carrier evidence the benefits to be derived from competition. The improvements on these two circuits substantiate our experience in the field generally, namely, that competition in direct radiotelegraph circuits is an important factor in causing each of the competitors to devise means to better serve the public in order to secure its patronage.

59. RCAC contends that its services are superior to those of Mackay and points to the numerous improvements it has made. This, however, is not a comparative hearing where we can license only one applicant and must therefore choose the better qualified of two applicants. Here the question is whether the public will benefit if *both* are licensed. It is not important which of the two provides better service at any given time, so long as both provide adequate service. If RCAC provides better service through its competitive effort to secure more traffic, then the public benefits. Mackay, in turn, is compelled to meet and surpass the improved RCAC service in order to retain and improve its position in the field. This process leads to cumulative improvements in service offered to the public.

60. *New Service.* Since it was authorized to operate the circuits to The Netherlands and Portugal, Mackay has

[1] In the course of the hearings, Mackay offered an exhibit with respect to its service to Portugal. The Hearing Examiner excluded this proposed exhibit. Mackay was granted an exception and in a memorandum accompanying its proposed findings requested that this exception be sustained and that the letters be admitted. We are sustaining the Hearing Examiner for the reasons set forth in the Appendix hereto.

provided only message service to these points. RCAC has, on the other hand, since issuance of the initial decision looking toward a grant of the Mackay applications, inaugurated TEX service and leased channel service to The Netherlands. It also provides program and radiophoto services with Portugal. RCAC points to the fact that Mackay offers only message service, and has thus far made no proposal to offer any other services to these points, as a reason for denying the Mackay applications.

61. We note that RCAC originated the new TEX service and extended its existing leased channel service after the close of the original hearings. TEX service has proved an important one for RCAC and has found wide acceptance among users. Revenues for TEX to The Netherlands have increased from $22,329 in 1950 to $102,199 in 1953. This was more than sufficient to offset the decrease of $59,000 in RCAC's revenues for message traffic exchanged with The Netherlands in the same period. In addition, RCAC's leased channel revenues for service to The Netherlands increased from $67,000 in 1950 to $96,000 in 1953.

62. It is not necessary to find that the prospect of competition by Mackay was the sole or even primary cause of the development of TEX service or the extension of leased channel service with The Netherlands. However, on the basis of our experience, it appears to us reasonable to assume that the prospect of such competition influenced RCAC in its efforts to seek new revenues and means of satisfying potential demand. We cannot expect a carrier which is opposing the introduction of additional competition to come forward and state that the prospect of such competition induced it to introduce new and lucrative services. Instead, we must rely on our experience in this field to weigh the intangibles involved. This leads us to believe, as stated above, that the prospect of competition was an underlying factor in the decision to provide those services. Just as we believe that RCAC was in part motivated by competitive considerations to provide such new

services, Mackay must, in order to retain its competitive position, meet these new services or fall behind in the race for public patronage. Our interest lies in providing a business climate conducive to the improvement of existing services and institution of new services. The evidence of record leads us to find that this has occurred.

63. *Summary.* All of the foregoing indicates that we have here a situation involving points which account for relatively large volumes of traffic and revenues; where service is good and is being further improved; where new services have been introduced; and where competition between direct radiotelegraph circuits is a factor in the improvements which have taken place.

64. *Alleged Adverse Effects.* RCAC urges, however, that existing facilities, without Mackay, are more than ample to satisfy all forseeable public demand; that there is sufficient competition without that provided by Mackay; and that the introduction of the Mackay circuits has had adverse effects upon it, as well as the entire United States international telegraph industry. We shall now consider these arguments.

65. *Capacity.* RCAC alleges that the carriers, other than Mackay, presently serving The Netherlands and Portugal are currently better able to fulfil all requests for message service than they were at the time of the original hearings in 1948, because traffic volume has declined and the facilities of such carriers have been improved so that they now have a greater capacity for handling traffic than in 1948.[1] There is no doubt that facilities and traffic

[1] RCAC in the course of cross-examination asked a question with respect to the possibility that Commercial might lay a new trans-Atlantic cable. Objection to the line of cross-examination was sustained. RCAC and Commission Counsel noted exceptions to the ruling. RCAC also made a brief summary of the line of questions it intended to ask. In its proposed findings RCAC referred to this matter and noted the aforementioned exceptions.

handling practices have been improved so that the carriers today are able to handle more traffic than in 1948. We note, however, that in 1948 RCAC operated a total of five channels to The Netherlands, four regular and one emergency—all devoted to message service. At that time it argued that this capacity was more than sufficient to handle the entire industry's traffic volume with The Netherlands. Since then it has increased its circuits to The Netherlands to nine channels, with two others in reserve, of which one is an emergency Morse circuit.[1] RCAC made this increase in capacity despite the opening of the Mackay circuits and the improvement in the plant and facilities of the other carriers. RCAC has, however, found uses for this increased capacity, using six channels to provide TEX service and one for leased service. Therefore, only two channels are now normally devoted to message traffic, whereas in 1948 RCAC had four channels regularly devoted to message traffic. Thus, its spare message capacity is actually lower today than in 1948. It should also be noted that eight out of the nine channels were regularly used to provide service in 1953, or almost 90 per cent utilization, whereas in 1947 one out of four channels was regularly used, or a 25 per cent utilization.

66. It appears to us that action on our part which would base a denial on the mere existence of excess capacity would enable the present licensee to forestall any possible competition by providing itself with more capacity than necessary. We also note that the existence of extra capacity,

---

On June 14, 1955, RCAC filed a petition to reopen the record and and include "new evidence," among other things, with respect to such cable. In considering this petition we ruled upon these exceptions and denied them in a Memorandum Opinion adopted June 22, 1955. Such Memorandum Opinion, insofar as it relates to the proposed cable, is incorporated herein by reference and therefore the exceptions of counsel for RCAC and the Commission are denied.

[1] The record shows that one of the two circuits is actually used about 50% of the time to provide service to the Netherlands and the balance of the time to serve Surinam

especially in the presence of competition, may well be a potent spur to the carrier to provide additional service and thereby not only make use of the spare capacity, but also gain additional revenues. As has been set forth more fully above, it appears to us that, in the presence of Mackay's competition, RCAC has not only increased its capacity but what is more important, had by 1953 found customers to make use of a greater proportion of its larger capacity that it had in 1947 with a smaller capacity.

67. *Other Competition.* RCAC points to the fact that in our original decision we found active and substantial competition in telegraph service with The Netherlands and Portugal, as well as telephone and air mail competition. RCAC alleged that telephone and air mail competition has not only continued at a high level, but also pointed to the fact that a new trans-Atlantic telephone cable was being laid. RCAC argued that this will result in new and intensified competition for communications traffic. On the basis of all of the foregoing, RCAC contended that competition would continue and, indeed, be healthier without Mackay circuits to The Netherlands and Portugal.

68. *Discussion.* We have already considered the effects of general competition between direct circuits and have found that such direct circuit competition is an important beneficial factor in the industry picture. As we have indicated above, we find considerations which lead us to believe that our general finding is also applicable to the circuit at issue.

69. Thus, The Netherlands is an important communications point from point of view of volume of traffic and revenues. It may be grouped with such points as Italy, Cuba, Argentina, Philippines, and Colombia, all of which are served by at least three radiotelegraph carriers, and most of which are also served directly by one or more cable companies. We also note that twenty-four countries which in 1953 had a smaller traffic volume than The Netherlands

were served by two or more competing direct radiotelegraph carriers.[1] We included such competition to points with a smaller traffic volume than The Netherlands in our evaluation of the general over-all effects of direct circuit competition and we, nevertheless, found that the benefits set forth above had resulted.

70. It is true that traffic with Portugal has declined considerably since the original hearings. This point, however, remains relatively important. It ranked 39th out of more than 120 foreign and overseas points in 1953. At that time, seven countries with a lower traffic volume were served by two or more direct competing radiotelegraph carriers[2] and, of these, three were also served by one or more cable companies. Here again direct radiotelegraph competition to such points with a smaller traffic volume played a part in the benefits we found result from direct radiotelegraph competition.

71. There is another consideration involved in the case of Portugal. It does not appear that the cable carriers have been able to provide effective competition to RCAC in the handling of traffic, particularly in the inbound direction. In 1950, the last full year before Mackay opened its circuits to Portugal, RCAC handled 55.8 per cent of the outbound traffic and 48.2 per cent of the inbound traffic. It realized 70.9 per cent of the total industry revenues for the message traffic exchanged with Portugal. In 1953, after two and one-half years of Mackay competition, there was a more balanced competitive picture. RCAC was still the major carrier, handling 42.8 per cent of the outbound traffic, 46.1 per cent of the inbound traffic, and realizing 52.2 per cent of the industry's revenues. (See attached Tables A, B, and C.) Thus, while there undoubtedly was competition

---

[1] Of these 36 points 27 were served by Mackay and RCAC by direct circuits in other than Portugal.

[2] Of these 7 points 3 were served by Mackay and RCAC either directly or via Portugal.

previously, there is now effective competition and a more nearly even division of the available traffic.

72. In our evaluation of the extent and effectiveness of the competition other than that provided by Mackay, we must also bear in mind the fact that both The Netherlands and the Portuguese Administrations have no proprietary interest in the operation of the United States cable carriers and receive relatively little financial return from traffic handled by them. They, therefore, actively seek traffic for their respective radio circuits, where they share in the tolls. Since we have found competition by direct radio circuits to be beneficial, we feel that competing carriers such as Mackay should be permitted to share proportionately in such inbound traffic and the revenues therefrom, in order to be able to compete effectively. (See attached Tables A, B, and C for detailed data regarding the share of each carrier serving The Netherlands and Portugal in outbound, inbound, and total message traffic and revenues.)

73. Further regarding the matter of competition and the effect of the Mackay circuits thereon, we note that in the course of the original hearings, a fear was expressed that the opening of the Mackay circuit would result in the virtual withdrawal of its affiliate, Commercial, from competition to the two points, and might also adversely affect Western Union's ability to compete effectively. Data introduced at the further hearings indicate that such fears have not been realized. As is set forth in attached Table C, both Commercial and Western Union have actually increased their shares of the message traffic exchanged with each point for 1953 as compared with 1950. The introduction of the Mackay competition apparently has been a factor in spurring all carriers, including the cable carriers serving these points, to redouble their efforts to better serve the public in order to retain or improve their relative shares of the traffic.

74. In evaluating RCAC's views on competition, note should be taken of its expressed position with respect to duplicating direct radiotelegraph circuits. RCAC's opposition to a grant of the applications herein is based on its position that competition between direct radiotelegraph circuits is not in the public interest. RCAC also takes the position that in general it is opposed to the grant of a duplicate direct circuit regardless of the amount of traffic available, if the radiotelegraph carrier already serving the point provides adequate service. In essence, therefore, RCAC recommends that the Commission adopt a policy of licensing only one radiotelegraph carrier to provide direct service to any one point.

75. On the other hand, RCAC does not affirmatively oppose competition by a second radiotelegraph carrier over indirect routes by relay at some intermediate foreign point. RCAC also does not suggest that the Commission take steps to prohibit competition by such indirect service. In this connection it is to be noted that the Commission does not limit any carrier to the handling of traffic only to those points which it is authorized to serve directly. To the contrary, both the cable and radiotelegraph carriers subject to the jurisdiction of this Commission handle traffic to numerous points which they do not serve directly.

76. We have found that competition by direct circuits is generally more effective than competition over indirect routes. Service over indirect routes involves relays at foreign points with attendant delays for reprocessing. RCAC, for example, alleged that it gave better service over its circuit to India via automatic relay at its own Tangier station[1] than it did when it served India via London. In

[1] Relay via Tangier is considered to be the equivalent of a direct circuit for the purposes of our consideration of these applications, as RCAC opposes the grant of Mackay applications to serve The Netherlands via such a route, but does not affirmatively oppose competition via indirect routes.

addition, the handling of traffic by relay at a foreign point requires the carrier to share the tolls with a foreign administration and results in a smaller share thereof to the United States carrier.

77. We cannot agree with RCAC that we should deny the applications at issue because there is already other competition to these points. We have found that competition by direct radiotelegraph circuits is more conducive to such benefits than other types of competition. Acceptance of the RCAC argument would limit Mackay to competition over indirect routes, a means admittedly less effective. We cannot find that the public would be benefited by action on our part which would forbid competition by the most effective means (direct circuits), and would allow it by less effective means (indirect circuits). Accordingly, in view of all of the foregoing, we are of the opinion that in the factual context of this proceeding and on the basis of the findings thus far made, the existence of other types of competition in service to The Netherlands and Portugal should not deter us from granting the applications.

78. *Alleged Economic Injury to RCAC—Diversion of Traffic.* RCAC alleged that the opening of the Mackay circuits resulted in substantial diversion of message revenues from it to Mackay and the AC&R system. According to RCAC, such losses in 1953 totalled $133,577, composed of $95,456 in the case of The Netherlands, and $38,121 in the case of Portugal. RCAC reached these totals by means of a computation whereby it assumed that its percentage loss, or the percentage gain of the AC&R system, whichever was smaller, occurring since the opening of the Mackay circuits was due to the opening of such circuits. It then applied this percentage factor to the 1953 revenues from message traffic and arrived at the aforementioned figures. RCAC justified using the total AC&R gain, rather than just the Mackay gain, on the ground that the AC&R system was operated as an integrated unit, and Mackay could divert traffic to Commercial at will.

79. It does not appear to us that the RCAC computations are based upon valid assumptions. Insofar as outbound traffic is concerned, it does not appear that it is possible to measure with any degree of accuracy the effect of the opening of the Mackay circuits on the volume of outbound traffic handled by RCAC. This is so because in the United States, Commercial Cable, All America, and Western Union, as well as Mackay, compete with RCAC for the traffic files of customers. Thus, for example, it is possible for RCAC to lose the traffic files of certain customers to Western Union, and simultaneously for Western Union to lose the traffic files representing a similar amount of traffic of other customers to Mackay. It is also to be noted that since the close of the record at the last hearings RCAC has introduced and greatly expanded its TEX service with The Netherlands. RCAC contended that TEX service did not divert any traffic or revenues from message service. On the other hand, a witness for Western Union testified that in his opinion a customer-to-customer service provided by his company, which is relatively more expensive than TEX, had resulted in a loss of about fifty per cent of the message file theretofore sent by the users of this service. It appears to us that the Western Union experience provides a far more realistic estimate of the effect of customer-to-customer service on message volume than that hypothesized by RCAC. Accordingly, we are of the opinion that some of the loss in outbound message volume to The Netherlands which RCAC suffered in recent years is due to the inauguration of its TEX service and to the use thereof by its customers in lieu of message service. In addition, it should be noted that there has been an increase in RCAC's leased channel revenues, and that it is quite probable that some of RCAC's message traffic is now being handled over such leased channels, thereby decreasing the RCAC total message traffic to The Netherlands. In such circumstances, it is not possible to attribute, with any degree of certainty, the RCAC loss in traffic solely to the opening of a Mackay circuit, nor can the Mackay gain be assumed to be at the expense of RCAC. (See attached Table A for exact changes

in the shares of outbound traffic to The Netherlands and Portugal handled by the various carriers.)

80. In the inbound direction, another situation exists. The radio administrations in The Netherlands and Portugal each turn over United States destined traffic to the United States radio carrier, or carriers, providing service to its country. If there is only one such radio carrier, it receives all of the traffic at the disposal of such radio administrations which does not bear a recognized "par fil" (by wire, i.e., cable) routing. If there is more than one radio carrier, then such administrations divide the traffic at their disposal among all United States radio carriers with which they communicate. It would appear, therefore, that RCAC is correct insofar as it assumes that Mackay's gain in inbound traffic is at its expense, because, absent a Mackay circuit, RCAC would have received all of the traffic at the disposal of the foreign administration.[1]

81. RCAC's argument that the gains of Commercial in the share of the traffic revenues should be considered in computing RCAC's losses due to the opening of the Mackay circuits, is based on the premise that Mackay diverts to Commercial traffic which it (Mackay) has received from customers who previously routed their traffic via RCAC. This position of RCAC is exactly the reverse of the one it took at the original hearings.[2] At that time RCAC argued that Mackay should not be licensed since such action would virtually eliminate cable competition by Commercial

[1] As noted above, we believe that TEX has caused some part of the drop in RCAC's outbound traffic. Likewise, TEX affects and diminishes the amount of inbound radio traffic coming into the hands of the foreign administrations. Insofar as this has occurred, it partly accounts for any absolute decrease in inbound messages handled by radio. This is also probably true with respect to RCAC's leased channel services.

[2] As set forth more fully below in paragraph 94, RCAC again relied on this argument in the Proposed Findings it filed after the further hearings, as a further reason for denying the Mackay applications.

because the AC&R system would tend to divert Commercial's traffic to Mackay wherever possible in the outbound direction in order to enable Mackay to secure a greater proportionate share of the inbound traffic from its foreign radio correspondent. It appears to us that, on the basis of the considerations formerly urged by RCAC, the present allegedly deliberate diversion of traffic from Mackay to Commercial is unlikelly because it would be in derogation of the financial interest of the AC&R system. We are further supported in our view by the fact that Commercial suffered a loss of 6/100 of one percentage point in revenues for outbound traffic to The Netherlands for the period. The AC&R total traffic gain (on inbound and outbound together) on which RCAC relies was in fact composed of a gain by Commercial on traffic inbound, but it must be noted that this gain could have in no way have resulted from diversion of traffic from Mackay to Commercial, as Mackay does not operate in The Netherlands but relies entirely upon its foreign correspondent for traffic. (It is also to be noted that Western Union, which has no radio affiliate, also showed increases in its share of the traffic revenues for traffic exchanged with both The Netherlands and Portugal.) In view of all of the foregoing, we cannot accept the RCAC contention that the gains of Commercial should be considered in determining whether RCAC suffered any losses because of the opening of the Mackay circuits.

82. As we have stated, we are of the opinion that the only acceptable measure of the RCAC losses which may be attributed to the opening of the Mackay circuits is that relating to the decrease in RCAC's revenues for inbound traffic.[1] The record shows that such decreases, in the year 1953, for inbound traffic revenues from both The Netherlands and Portugal were approximately $55,000. This is to be contrasted with RCAC's reported total operating revenues in the sum of $16,106,000. Thus, the loss in revenues due to this diversion amounts to one-third of one

[1] But see footnote 1 to paragraph 80, *supra*.

per cent. This must also be considered in the light of the over-all increase in total revenues from operation of the circuits at issue which RCAC enjoyed for 1953 as compared with 1950, even on the basis of its own allocation studies (see paragraph 86, *infra*).

83. RCAC further argues, however, that, if Mackay's contract with The Netherlands, which provides that fifty per cent of the combined Commercial-Mackay traffic volume outbound from the United States is to be handled by Mackay, had been in effect during 1953, RCAC's revenues for traffic inbound from The Netherlands would have been reduced by an additional sum approximating $50,000 per year. Even if we accept this estimate, it is to be noted that the over-all reduction of RCAC's revenues would be only about three-fifths of one per cent of its total 1953 operating revenues. This insignificant effect on RCAC's revenues must be measured against the over-all public benefits which we have hereinabove found to accrue from competition between these direct radiotelegraph circuits, as well as the aforementioned increase in RCAC's total allocated net operating revenues from this circuit. In view of all the foregoing, it does not appear to us that this potential loss on the part of a carrier whose operations over a sixteen-year period have, on the average, been as profitable as RCAC's, should cause us to forego the type of benefits which we believe competition has brought and can continue to bring to the using public.

84. *Allocation Studies—Allegedly Demonstrating Economic Injury.* RCAC contended that the opening of the Mackay circuits had reduced its allocated net operating revenues from message service on The Netherlands circuit to $22,000 in 1953 as against $45,000 in 1950. Insofar as Portugal is concerned, RCAC claimed that the allocated net operating loss of $10,000 from message service, which it had suffered in 1950, had been increased to $40,000 in 1953.

85. The nature of the operations of both RCAC and Mackay is such that there is no direct means of determining even the approximate cost attributable to the provision of telegraph service to The Netherlands and Portugal. In order to arrive at a reasonable approximation of such costs, it is necessary to resort to separation studies and allocation procedures. In response to an issue[1] set forth by the Commission in its Order of March 1, 1954, calling for further hearings herein, both Mackay and RCAC submitted allocations studies designed to show operating revenues derived from providing service to The Netherlands and Portugal and the costs attributable to the provision of such service.

86. As will be set forth more fully below, we do not believe that the allocation studies submitted do or can provide accurate measures of the results of operation of the circuits at issue. However, even if we were to accept the RCAC study as accurate, it appears to us that it demonstrates the economic feasibility of competition to the points at issue. RCAC based all its contentions on the alleged decrease in its allocated message revenues. As noted above, however, RCAC now also provides non-message services to the points at issue. We have found that the Mackay competition was a factor in the introduction of such services. We have further found that some parts of the TEX revenues were probably derived from the diversion of message traffic. Accordingly, we feel that the over-all results of the operations with The Netherlands and Portugal should be considered in evaluating RCAC revenues from these circuits. In this connection, the RCAC exhibits

---

[1] This issue was as follows: "To obtain data with respect to the costs properly attributable to and the net operating revenues resulting from message telegraph service and each type of non-message communications service provided by each respondent carrier between the United States, on the one hand, and Portugal and The Netherlands, on the other hand, for each of the years 1947 through 1953, inclusive; . . ."

indicate the following allocated net earnings for all services provided by RCAC over the circuits:

	1950	1953
Portugal	($11,108)	($ 40,718)
The Netherlands	90,242	133,124
Both circuits	79,134	92,406

( ) denotes loss.

It thus appears that in 1953, after more than two years of direct radiotelegraph circuit competition, over-all operations on those two circuits are much more profitable than in 1950, the year before Mackay opened its circuits. This appears to us to substantiate our over-all findings that in this field effective competition by direct circuits is an important spur to the carriers in causing them to seek to provide new, and improve existing services, in the public interest, and at the same time enhance their earnings. Finally, it is interesting to note that these two circuits in 1953, on the basis of RCAC's own study, resulted in allocated net operating revenues of over $92,000 as against a claimed allocated loss of $873,825 for all east coast operations. Under these circumstances, it would appear that competition on these circuits would be more feasible than in most other places served via the east coast.

87. We shall now turn our attention to the particular allocation studies introduced by the parties. Before considering these studies in detail, we note that the Commission's Uniform System of Accounts does not require a continuing record of costs identified with service to or from any particular point. Likewise, the Commission has never formally prescribed any system of allocation by rule or otherwise.[1] The methods used by the carriers are there-

[1] In 1947, in connection with another proceeding, a basic procedure was devised, as a result of conferences between staff members and representatives of interested carriers, for assigning plant investment and operating revenue deductions to individual circuits. This procedure has, however, never been officially adopted by the Commission.

fore their own and were not approved by this Commission in any way.

88. Mackay and RCAC did not use identical methods. We also note that, under the system employed by RCAC, it appears that for 1953 its entire operations on the east coast of the United States, which accounted for 61.8% of its total revenues, were conducted at a loss of $874,000, despite the fact that for that year RCAC indicated over-all net operating revenues of $1,283,000 before federal income taxes.[2] According to this method of allocation, RCAC alleged that operations in the Pacific area resulted in net operating revenues, before federal income taxes, of more than $2,000,000 in 1953. Yet, it was admitted that if its east coast operations had been discontinued in 1953, RCAC would not have realized net revenues of $2,000,000 or any such figure approaching this amount.

89. Mackay estimated, on the basis of its allocation study, that in 1953 it had realized $7,778 in net operating revenues before federal income taxes from the operation of the circuits at issue. We do not believe the Mackay study to be accurate, because Mackay tended to underesimate its share of the common AC&R expenses and overestimate non-message expenses. We also note that on the basis of recomputation made by RCAC using its allocation methods that company estimated Mackay lost about $17,700 from its operation with The Netherlands and Portugal. However, each of these estimates, even if they were accurate measurements of results, is to be contrasted with Mackay's net operating income of $1,357,370 before federal income taxes and $694,403 after such taxes for 1953. It does not appear to us that either the profit estimated by Mackay or the loss estimated by RCAC would have any appreciable effect on Mackay's over-all financial position.

[2] This amount used by RCAC in its allocation studies is after certain adjustments it made for below-the-line items, and, therefore, differs from the RCAC reported net operating income used elsewhere herein.

particularly in view of the short time it has operated the circuits.

90. Aside from the problem presented by the particular methods used, it is to be noted that the processes involved in allocating aggregate costs to estimate the amounts applicable to such a small segment of the carriers' over-all operations as is represented by operation of circuits with The Netherlands and Portugal require so many steps and involve so many possibilities in selection and application of data that a wide variety of answers can be obtained. The method of operating a circuit and the number of hours it is operated, which are under the complete control of the operating company, materially affect the number of transmitter and receiver hours charged to the circuit, and, therefore, materially affect the costs allocated to the circuit. For example, both RCAC and Mackay allocated their transmitter station costs for The Netherlands and Portugal circuits on the basis of the number of hours transmitters were operated on these circuits. RCAC, however, operates an independent circuit to Portugal and charged the full transmitter costs to the Portugal circuit, whereas Mackay, which "forks" the Portugal circuit with Spain, divided its transmitter costs between Portugal and the Spain circuits. In the same manner, RCAC charged the full time of several transmitters to The Netherlands circuit as a whole and further sub-allocated part of this total time to its message telegraph service, whereas Mackay, which operates its Netherlands circuit, along with a number of other circuits, via Tangier, charged only a fraction of the New York area transmitter hours to The Netherlands circuit. Further, changes in the hours and methods of operation of other circuits, not related to the circuits under study, operated by a company can materially affect the costs allocated to operating such circuits as are at issue.

91. *Comparability of Portugal and Surinam.* RCAC alleged that the decrease in traffic with Portugal when considered in connection with the alleged allocated loss indi-

cated that Portugal was now in a situation similar to that of Surinam. It referred to the Commission's original decision wherein the Mackay application for Surinam had been denied, in part because of RCAC's allocated loss and the prospect that such loss would be increased by a grant of the Mackay application. RCAC therefore argued that the Portugal application should be denied.

92. We cannot agree that Portugal is comparable to Surinam. In 1947, traffic with Surinam totalled only 333,978 words, whereas in 1953, total words exchanged with Portugal were 2,248,000 or about seven times as great. In 1947, traffic exchanged with Surinam produced $11,613 in revenue, whereas message traffic exchanged with Portugal in 1953 produced $138,000 in revenues, or about 12 times as much. In this connection, we note that in 1951 the Commission authorized Tropical Radio Telegraph Company to operate a circuit to El Salvador. Its order of July 18, 1951, indicates that, before granting the application, the Commission reviewed the then current volume of traffic exchanged with El Salvador by all carriers serving that point and found that the added competition of a second direct radiotelegraph circuit was reasonably feasible and would serve the public interest, convenience and necessity. In its order, the Commission also noted that the volume of traffic between the United States and El Salvador was sufficient to justify effective competition by direct radiotelegraph circuits. It appears that in 1950, traffic exchanged with El Salvador totalled 1,145,270 words, or about one-half the traffic volume exchanged with Portugal in 1953. Revenues from traffic exchanged with El Salvador in 1950 were $124,402 as against revenues of $138,000 for traffic exchanged with Portugal in 1953. In the Commission's order it was also noted that the AC&R system, which was the major carrier, accounted for 63.5% of the outbound traffic and 74.1% of the inbound traffic exchanged with El Salvador. In 1950, RCAC accounted for 55.8% of the outbound and 84.2% of the inbound traffic exchanged with Portugal. In 1953, El Salvador ranked 53rd, and Portugal 39th, in the order of total volume of traffic exchanged with foreign and overseas

points. On the basis of these figures, the introduction of competition by direct radiotelegraph circuits appears more feasible in the case of Portugal than in the case of El Salvador.

93. *Injury to Bargaining Position.* RCAC reiterates the argument made at the original hearings that competitive circuits enable the foreign correspondent to "play off" one United States carrier against another and cites a report to this effect made by the Commission in 1938. We discussed this question in our original decision and indicated we had ample powers in connection with our licensing authority to prevent abuses. We now note that after the more than two years of operation of the circuits by Mackay, no evidence of any attempt to "play off" one carrier against another is evidenced by the record of the further hearings. On the basis of our general experience in this field since 1938, our specific experience with respect to The Netherlands and Portugal, and in view of our licensing powers, we are of the opinion that such danger is at this time theoretical rather than actual.

94. *Effect on Industry Revenues.* RCAC argues that, since Commercial retains a greater share of the tolls than Mackay, any diversion of traffic from the former to the latter results in a revenue loss to the industry.[1] There is no doubt that Commercial does retain a larger share of the tolls than Mackay. Data of record with respect to traffic originating in the United States indicates that Commercial was actually handling a greater share of the traffic originating in the United States destined to both The Netherlands and Portugal in 1953 than in 1950,[2] the last full

[1] As set forth above in paragraph 81, this argument is inconsistent with the position of RCAC that Mackay diverts traffic to Commercial.

[2] In 1950, Commercial handled 18.5% of the total originating message traffic, in words, outbound to The Netherlands and 2.3% of such traffic to Portugal. In 1953, it handled 20.2% to The Netherlands, an increase of 1.7 percentage points, and 5.6% to Portugal, an increase of 3.3 percentage points.

[illegible] Mackay agreed to accounts. Under these circumstances and in the absence of specific evidence in the record to the contrary, we cannot find that there has been any appreciable diversion of outbound traffic from Commercial to Mackay. As in the case of the danger that Commercial would cease to be a factor in the field (see paragraph 73 above), or the charges that foreign administrations would play one carrier off against the other, this also seems more a theoretical possibility than an actual fact. Accordingly, we cannot find that the opening of the Mackay circuits has in fact caused any revenue loss to the United States telegraph industry.

65. *Frequencies.* RCAC contends that the licensing of Mackay would create new and intensified frequency requirements; that Mackay would require frequency time on four frequencies to serve The Netherlands directly and on six frequencies to serve Portugal; that there is a critical shortage of frequencies for the international fixed point-to-point service; that both it and Mackay have unsatisfied frequency needs; and that, therefore, a grant of the applications "is incompatible with" current efforts by the Commission and foreign governments to solve problems involved in implementing international agreements relating to the use and assignment of frequencies.

[illegible] If the agreement between Mackay and The Netherlands administrations requiring Mackay to handle 50% of the combined outbound traffic of both radio and commercial were to be put into effect, an appreciable loss to the latter would result. The record shows that in 1951 Mackay handled a total of 282,786 originating outbound words of all classes to The Netherlands and derived $21,378 of revenue therefrom, or 7.45 cents per word. In the same year, Commercial handled 1,967,808 originating outbound words of all classes to The Netherlands and derived $113,319 therefrom, or 11.08 cents per word. Thus Commercial retained 3.21 cents per word more than Mackay retained per word. If the agreement had been in full effect in 1951, Mackay could have handled 290,020 additional words, and assuming a uniform distribution between the various classes of traffic, the additional loss to the United States communications industry as a whole would have been about $12,500. This is to be compared with total revenues of the industry of $[illegible] in 1951. Such possible loss is therefore 2/100 of 1% of such revenues.

96. The record shows that Mackay has not required any additional frequencies in the United States to open its service to The Netherlands and Portugal, as it serves the former via its pre-existing facilities at Tangier, and the latter on a "forked" basis with Spain which requires only one complement of frequencies for the two points. Mackay alleges that it would not require any new additional frequency assignments to serve The Netherlands if it were to eliminate its relay via Tangier with that country. It claims that its past experience has indicated that when a new circuit is integrated into a broad pattern of operation, the available frequency potential can be adapted to accommodate such new circuit through proper administration and the application of useful techniques.

97. We note that Mackay has been successful in adjusting its frequencies so that at the time of the further hearings herein (May, 1954), it had been operating for 18 months within the Table of Frequency Allocations agreed to internationally at the Atlantic City Telecommunications Conference in 1947. RCAC, on the other hand, was not yet fully "in band" at the time of such further hearings, even though both Mackay and RCAC had been assigned additional frequencies by this Commission to assist them in getting "in band".

98. It appears to us that there is a reasonable prospect that Mackay will be able to operate direct circuits to The Netherlands and Portugal (the latter forked with Spain), without requiring any additional frequency assignments. Even if Mackay were to require some small increase in its assignments, such increase, as well as the use of frequency time involved in the operation of the circuits at issue, must be considered in the context of this entire proceeding. It appears to us, on the basis of our experience in this field and the data of record herein, that the benefits the public will derive from the additional Mackay competition far outweigh the considerations advanced by RCAC with respect to frequency utilization.

99. *Immediate Tangible Benefits.* RCAC alleges that the evidence of record at the further hearings confirms and even strengthens the findings we made originally with respect to lack of immediate tangible benefits to be derived from competition with respect to rates, speed and quality of service and generation of new traffic. Under the Supreme Court opinion, we are not required to make findings of immediate tangible benefits. We have hereinabove made findings with respect to the over-all benefits of competition, and, as set forth below, we believe that such benefits support a conclusion that the reaffirmation of the Mackay applications gives ample ground for a reasonable expectation that competition will have not merely some, but a considerable, beneficial effect.

Conclusion.

100. *Summary.* The evidence of record, when reviewed in the light of the twenty years' experience of this Commission in the regulation of international telegraph communications, indicates to us that:

(a) There has always been substantial competition in the field, particularly between radiotelegraph carriers;

(b) Competitive direct radiotelegraph circuits are the most important factor in the over-all competitive picture;

(c) Competition in direct radiotelegraph circuits has been constantly increasing;

(d) The share of the total traffic handled by radiotelegraph carriers has increased from 28% to 53.4% between 1936 and 1953;

(e) Despite the increasing competition between Mackay and RCAC in the operation of direct radiotelegraph circuits:

(i) Mackay and RCAC have increased their respective shares of the industry's message volume, message revenues and total revenues;

(ii) RCAC has enjoyed substantial net operating revenues over the entire period, while Mackay has recently begun to enjoy such revenues;

(iii) both Mackay and RCAC are in sound financial condition;

(f) Competition in direct radiotelegraph circuits was an important factor in:

(i) the large investment made by Mackay and RCAC in new and improved plant;

(ii) the introduction of more modern equipment and facilities, as well as of improved central office traffic handling procedures;

(iii) the development of new services, such as leased channel, scheduled transmission, and TEX, which fill a public need and are a source of considerable revenues to the carriers;

(iv) the rate reductions introduced after World War II and the fact that current rates per full-rate word are below those in effect in 1939;

(g) The circuits at issue do not involve large investments in plant or expenditures of money and so differ from natural or economic monopolies;

(h) The points at issue are relatively important traffic centers and account for considerable revenue;

(i) Competition by Mackay's direct radio circuits is reasonably feasible to both The Netherlands and Portugal;

(j) Competition by direct radiotelegraph circuits has been a factor in causing:

(i) the improvements in facilities, plant and service which has taken place since the close of the record in the original hearing;

(ii) the introduction of new and lucrative services to The Netherlands so that it appears that at the close of the record at the further hearings a smaller part of RCAC's total capacity was devoted to message traffic than at the time the original hearings were held;

(k) There are ample grounds for a reasonable expectation that continued operation of the circuits at issue by Mackay will have considerable beneficial effect in the future;

(l) The detrimental results which RCAC alleged would result from additional competition by direct radiotelegraph circuits have not taken place or are far outweighed by the benefits which may reasonably be expected from a grant of the Mackay applications.

101. We wish to make it clear that we are deciding this proceeding on the conclusions we have reached on the basis of the relevant data in the particular case now before us. We are not enunciating a general policy with respect to the licensing of duplicate direct radiotelegraph circuits in international telegraph communications, nor do we intend our decision to be construed as an indication that we would, in every future case, authorize duplicating direct international radiotelegraph circuits. What we require is, that, in order to be successful an applicant must demonstrate, that, as has been done here, through the operation of such a circuit, some public need would be served or some advantage would accrue to the public, or at least that there is a reasonable expectation that such competition may have some beneficial effect.

102. In view of all of the foregoing and upon consideration of the entire record herein, as well as the pleadings and arguments of the parties, we find and conclude:

(a) That the public interest, convenience and necessity will be served:

(i) by a grant of the application of Mackay for modification of license to communicate with Amsterdam, Netherlands, and

(ii) by a grant of the application of Mackay for modification of license to communicate with Amsterdam, Netherlands via Tangier;

(b) That the public interest, convenience and necessity will be served by a grant of the application of Mackay for modification of license to communicate with Lisbon, Portugal;

(c) That in view of the foregoing conclusions, the applications of Mackay for special temporary authority to communicate with The Netherlands and Portugal become moot and should be dismissed.

103. As noted above, in our decision released on February 23, 1951, we granted Mackay's applications for authority to communicate with The Netherlands and Portugal. Simultaneously, we modified Mackay's Brentwood license to reflect such grants. In December 1951 we granted Mackay a renewal of license for its Brentwood station, and included therein authority to communicate with The Netherlands and Portugal. In 1952, Mackay again applied for renewal of its Brentwood license, including therein a request for renewal of authority to communicate with The Netherlands and Portugal. However, before action was taken on this application the circuit court handed down its decision reversing the Commission's grant of the applications. Accordingly, pending final disposition of the matter, no action was taken on the request for renewal of authority to communicate with these points. Mackay continued to operate circuits to these two points pursuant to the provisions of Section 9(b)[1] of the Administrative Procedure

[1] 5 U. S. C. 1008.

Act and Section 1.384 of our Rules, pending a final decision herein. In our order of December 3, 1953, we reaffirmed our intention of permitting Mackay to continue to operate these circuits until we issued a final decision herein. Accordingly, to the extent that any renewal applications filed by Mackay requesting renewal of authority to communicate directly with The Netherlands and Portugal or with The Netherlands via Tangier, may be deemed to be before us, they should also be granted.

ORDER

It is, therefore, ORDERED this 22nd day of June, 1955, that pursuant to the provisions of Section 309 of the Communications Act of 1934, as amended, that part of the application of Mackay Radio and Telegraph Company, Inc. for modification of license to authorize direct communication with The Netherlands and Portugal (File No. 8047-MLHT-A) and its application for modification of license to authorize communication with The Netherlands via Tangier (File No. 7619-C4-ML-C) ARE GRANTED:

IT IS FURTHER ORDERED, That, in so far as the application of Mackay Radio and Telegraph Company, Inc. for renewal of the Brentwood, Long Island, station license filed on September 29, 1952 (File No. 44-C4-R-53), requested a renewal of authority to communicate with The Netherlands either directly or via Tangier, and with Portugal directly, or in so far as any other application for renewal filed subsequently thereto by Mackay Radio and Telegraph Company, Inc., containing a similar request may be deemed to be before the Commission for consideration and disposition, such application or applications ARE GRANTED:

IT IS FURTHER ORDERED, That the license of Mackay Radio and Telegraph Company, Inc. for its fixed public service station located at Brentwood, Long Island, New York (File No. 44-C4-R-55) IS MODIFIED as follows:

Section 2 add:

(a) Operating Agency	(b) Point of Communications	(c) Special Provisions (Reference Nos.)
Administration of Posts Telegraph and Telephone of The Netherlands	Amsterdam, Netherlands	5
Companhia Portuguesa Radio Marconi	Lisbon, Portugal	—

IT IS FURTHER ORDERED, That the applications of Mackay Radio and Telegraph Company, Inc. for special temporary authorization to communicate with The Netherlands and Portugal (T1-RSA-657-1 and T1-RSA-658-1) ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION*

MARY JANE MORRIS
Secretary

Released: June 30, 1955

---

* See attached Dissenting Statements of Commissioners Webster, Bartley and Doerfer.

TABLE A

Percentage Distribution Among Listed Carriers of Outbound Word Volume to The Netherlands and to Portugal, and Revenues Accruing Therefrom, 1947-1950-1953.

	1947		1950		1953	
	% of Total Words	% of Total Revenues	% of Total Words	% of Total Revenues	% of Total Words	% of Total Revenues
	The Netherlands					
RCAC	29.8	24.8	32.9	26.8	27.1	21.8
Mackay	.1	—[1]	.4	.2	6.1	4.9
Commercial	22.7	28.0	23.6	27.7	22.9	27.6
Western Union	47.4	47.2	42.8	45.1	43.5	45.3
All America	—	—	—	—	—[1]	—[1]
French Telegraph	—	—	.3	.2	.4	.4
	100.0	100.0	100.0	100.0	100.0	100.0
	Portugal					
RCAC	49.2	(53.0)[2]	55.8	50.3	42.6	37.0
Mackay	6.0	1.1	8.5	9.0	20.9	26.1
Commercial	6.8	2.6	2.3	3.3	5.4	7.7
Western Union	38.0	(50.7)	31.2	32.0	30.6	28.0
All America	—	—	1.2	3.4	—[1]	—[1]
French Telegraph	—	—	1.0	2.0	.5	1.2
	100.0	(100.0)	100.0	100.0	100.0	100.0

[1] Less than one-tenth of one per cent.

[2] The revenue loss to RCAC and Western Union exceeded the net revenues of Mackay and Commercial. Thus, of the over-all loss of $35,440, RCAC accounted for $18,788 and Western Union for $17,974, while Commercial and Mackay reported net revenues of $922 and $400, respectively.

COPY BOUND C

TABLE B

PERCENTAGE DISTRIBUTION AMONG LISTED CARRIERS OF INBOUND WORD VOLUME FROM THE NETHERLANDS AND PORTUGAL, AND REVENUES ACCRUING THEREFROM, 1947-1950-1953.

	1947		1950		1953	
	% of Total Words	% of Total Revenues	% of Total Words	% of Total Revenues	% of Total Words	% of Total Revenues
			The Netherlands			
RCAC	52.2	44.1	48.7	39.0	35.8	28.7
Mackay	.1	—[1]	.4	.2	6.6	4.0
Commercial	17.5	21.7	22.7	28.3	26.6	33.4
Western Union	30.2	34.2	28.2	32.5	31.0	33.9
All America	—	—	—	—	—	—
French Telegraph	—	—	—	—	—	—
	100.0	100.0	100.0	100.0	100.0	100.0
			Portugal			
RCAC	79.5	86.4	84.2	88.6	55.1	57.5
Mackay	3.1	3.9	2.2	1.0	28.6	30.2
Commercial	2.7	2.1	.5	.4	2.2	1.7
Western Union	14.7	7.6	13.1	10.0	14.1	10.6
All America	—	—	—	—	—	—
French Telegraph	—	—	—	—	—	—
	100.0	100.0	100.0	100.0	100.0	100.0

[1] Less than one-tenth of one per cent.

CLOSE IN CENTER

PAGE BOUND VERTICAL IN BOOK

TABLE C

AMOUNT AND SHARE OF TOTAL WORDS AND REVENUES ACCRUING TO LISTED CARRIERS FROM TRAFFIC WITH THE NETHERLANDS AND PORTUGAL, 1947-1950-1953

(000 omitted)

	1947				1950				1953			
	Words	% of Total	Revenues	% of Total	Words	% of Total	Revenues	% of Total	Words	% of Total	Revenues	% of Total
The Netherlands												
RCAC	5,429	40.2	$260	34.7	5,136	40.6	$ 380	33.3	3,918	31.1	$ 321	25.5
Mackay	9	.1	— [1]	—	54	.4	2	.2	798	6.4	56	4.4
Commercial	2,746	20.3	185	24.8	2,926	23.1	320	28.0	3,098	24.6	386	30.7
Western Union	5,335	39.4	303	40.5	4,512	35.7	440	38.4	4,751	37.7	492	39.2
All America	—	—	—	—	—	—	—	—	— [2]	—	— [1]	—
French Telegraph	—	—	—	—	19	.2	1	.1	27	.2	2	.2
Totals	13,519	100.0	748	100.0	12,647	100.0	1,143	100.0	12,592	100.0	1,257	100.0
Portugal												
RCAC	3,180	61.6	168	93.0	1,540	67.7	113	79.9	1,062	47.2	$ 72	52.2
Mackay	251	4.9	9	4.8	133	5.8	4	2.8	533	23.7	40	29.2
Commercial	262	5.1	5	3.0	36	1.6	1	1.0	95	4.2	5	3.2
Western Union	1,468	28.4	[3](1)	[3](.8)	537	23.6	21	15.0	551	24.6	21	15.1
All America	—	—	—	—	15	.7	1	.8	— [2]	—	— [1]	—
French Telegraph	—	—	—	—	14	.6	1	.5	7	.3	— [1]	.3
Totals	5,151	100.0	$181	100.0	2,275	100.0	$ 141	100.0	2,248	100.0	$ 138	100.0

[1] Less than $500.
[2] Less than 500 words.
[3] Revenue loss.

APPENDIX

Ruling on Mackay's Exception.

1. In the course of the further hearing herein, Mackay offered an exhibit, numbered 286 for identification, in evidence. This exhibit consisted of copies of two letters. The first, dated August 18, 1953, was from C. R. McPherson, identified as a vice president of Mackay, to A. de Q. R. Vaz Pinto, identified as director general of the Portuguese Radio Marconi Company at Lisbon, Portugal, which is the correspondent of both Mackay and RCAC in Portugal. It contained five paragraphs, of which only the second and third are relevant herein. The second paragraph contains an allegation that Sr. Vaz Pinto had in the past told Mr. McPherson "that one of the best advantages of [Mackay's] circuit was the impetus it gave to . . . RCAC to improve its own service," and contains a query from Mr. McPherson as to whether this was still so and whether there is anything further Mackay could do to better its circuit conditions and consequently the RCAC service. The third paragraph mentions that the writer has noticed an increase in business and hopes that it reflects the growth of U. S.-Portugal trade "and the superiority of CPRM/MRT communications." The second letter offered by Mackay as part of its proposed Exhibit No. 286, dated at Lisbon on September 21, 1953, contains Sr. Vaz Pinto's reply. It contains only one paragraph which is relevant hereto, which says in effect that Portugese Marconi always tries to give RCAC and Mackay the most loyal and complete cooperation and "are very glad to notice the constant improvement in both circuits' efficiency." The Hearing Examiner excluded both letters on objection of RCAC. Mackay was granted an exception and in a memorandum accompanying its proposed findings requested that its exception to this ruling of the Hearing Examiner be sustained and that the letters be admitted.

2. RCAC had objected to the admission of these letters on the ground that they were hearsay; that the first letter was additionally excludible as a self-serving statement; and that the quoted statement from the second letter sets forth a conclusion without giving any of the facts upon which it may have been based.

3. At the time the exhibit was offered, counsel for Mackay stated that he did not intend that the first letter from Mr. McPherson should have "any evidentiary value at all," and that it was introduced to give an indication of what was intended by the penultimate paragraph of the second letter. In its memorandum Mackay pointed to the fact that, although under Section 1.871 of the Commission's Rules the rules of evidence applicable to civil non-jury proceedings in the federal courts are to be applicable to Commission hearings, they "may be relaxed if the ends of justice will better be served by so doing." It was argued that in the field of international communications it is not feasible to adhere in all cases to such rules of evidence because such action would require the appearance of witnesses from all parts of the world; that it was a common practice to admit letters and other types of correspondence and leave the matter of weight to the Commission; and that RCAC had introduced, without objection, an exhibit of an exchange of several messages between itself and Sr. Vaz Pinto. It was again stated that "the only purpose of the exhibit excluded by the Examiner was to show that both circuits with Portugal-RCAC's and Mackay's—had improved in operating efficiency."

4. Even if we were to agree with Mackay that the letters at issue may otherwise properly be admitted under the exception provided in Section 1.871 of our Rules, we are of the opinion that the letters must nevertheless be excluded, because they set forth conclusions without giving any factual basis therefor. In the absence of such facts, we cannot exercise our independent judgment as to the

grounds upon which the conclusions were based. We note in this connection that in the McPherson letter there is a statement that the Mackay circuit gave an impetus to RCAC to improve its own service. There are no facts, purporting to show on what grounds such statement was based, which would afford the Commission opportunity to evaluate its validity. There is also reference to the alleged "superiority of CPRM/MRT communications," but this conclusion is likewise not supported upon any factual foundation. In the Vaz Pinto letter, the author states that there is a constant improvement in both the Mackay and RCAC circuits. There is no indication of the nature of such improvement nor does the Vaz Pinto letter relate such improvement to competition between Mackay and RCAC. In view of all of the foregoing, we affirm the ruling of the Hearing Examiner and are not receiving proposed Exhibit 286 in evidence.

DISSENTING OPINION OF COMMISSIONER E. M. WEBSTER

In remanding this case to the Commission for such disposition as is open under its June 8, 1953 decision,[1] the Supreme Court stated in part as follows:

> "In reaching a conclusion that duplicating authorizations are in the public interest wherever competition is reasonably feasible, the Commission is not required to make specific findings of tangible benefit. It is not required to grant authorizations only if there is a demonstration of facts indicating immediate benefit to the public . . . but the Commission must at least warrant, as it were, that competition would serve some beneficial purpose such as maintaining good service and improve it . . . *it is not too much to ask that there be ground for reasonable expectation that competition may have some beneficial effect.* Merely to assume that

[1] *Federal Communications Commission, Petitioner* v. *RCA Communications, Inc., Mackay Radio and Telegraph Company, Inc. Petitioner* v. *RCA Communications, Inc.*, 346 U. S. 86, 96.

competition is bound to be of advantage, in an industry so regulated and so largely closed as this one, is not enough." (emphasis supplied)

Based on the Supreme Court's criterion for authorizing duplicate international circuits it appears to me that the facts in this case clearly point to a denial of Mackay's applications. For there is every indication from the evidence of record that a duplication of a majority of RCAC's circuits, as contemplated by Mackay, would result in a weakening of this country's international common carrier system.

Therefore, I am greatly troubled by the majority's decision to grant Mackay's applications, not only because I disagree so emphatically with the conclusion which it has reached, but also because I am unable to obtain a clear understanding of the reasoning upon which the conclusion is based, as I find it vague as well as factually unsupported.

However, from what I could gather from the decision, the majority bases its grant of the Mackay applications primarily upon what it believes to be benefits which have resulted from the existence of competition between direct radiotelegraph circuits in the field of international telegraph communications. That the majority does not point to specific results from such competition is worthy of particular note. Instead, it enumerates various improvements which have occured in the *overall* service and points to certain rate reductions which were instituted some *ten years ago* primarily by Mackay and RCAC. The majority thus assumes that the improvement in facilities and services and such rate reductions were caused primarily by the existence of competition in direct radiotelegraph circuits primarily between the applicant, Mackay, and RCAC. In other words, the majority deduces a causal relationship from the existence of two separate factors: *i.e.*, direct radiotelegraph circuit competition and the above-described benefits. I do not believe that the majority has demonstrated that the competition resulted in the improvements; nor do

I believe that the evidence of record would support or justify conclusions that the causal relationship did in fact exist.

The record shows that, after actually operating for three years insofar as The Netherlands and Portugal are concerned, Mackay has not introduced any new or different services. Instead it has limited itself solely to providing message telegraph service. RCAC, on the other hand, has originated, introduced and developed TEX service with the Netherlands. This service has met with ready customer acceptance and apparently meets an important customer need. The majority attempts to attribute the introduction of this service to the prospect of Mackay competition. Here again, it appears to me that the majority attempts to establish a causal relationship from what is an accidental coincidence of time. For, it is to be noted that the RCAC circuit to Switzerland, where there is no direct radiotelegraph competition, is generally of the character and calibre equal to that of the Netherlands where the majority attributes the improvements to the threat of Mackay competition.

But even if we were to assume that competition may have had some bearing upon the improvements described by the majority it does not follow that direct radiotelegraph circuit competition was a major or even important factor in such improvements. As the majority so well describes it, aside from direct radiotelegraph competition, there is very great competition in this field. As a matter of fact competition is afforded by direct cable circuits, by service provided indirectly by cable companies, by service provided indirectly by radiotelegraph circuits, by service provided by airmail facilities of the Post Office Department, and by service provided directly and indirectly through the telephone facilities of the American Telephone and Telegraph Company. If competition was a factor in securing improvements, then certainly the major credit should go to those numerous other types of competition which have existed.

If we turn from the general to the specific, we find that there is ample and extensive competition now existing for the patronage of customers to both the Netherlands and Portugal, the two points at issue. For example, as is set forth in Table A attached to the Opinion of the majority, Western Union, which serves the Netherlands directly, handles considerably more of the outbound traffic to the Netherlands than does RCAC. In addition, both Western Union and Commercial enjoy a greater share of the revenues for traffic outbound to The Netherlands. In fact the cable carriers, in 1953, accounted for almost 73% of the total revenues accruing from traffic outbound to The Netherlands and almost 70% of the total revenues accruing from both inbound and outbound traffic (See Table C). Even in the case of Portugal, where RCAC enjoys a somewhat larger share of the traffic and revenues, the cable carriers in 1953 handled over 35% of the outbound traffic and accounted for more than 35% of the revenues accruing from outbound traffic. These figures demonstrate very clearly that if competition may be assumed to result in benefits there is already sufficient active and effective competition without the addition of the Mackay circuit to assure the public of a continuation of any benefits which might have resulted in the past.

The majority, in its opinion, admits that the grant of the Mackay circuit will in fact reduce the revenues which now accrue to RCAC without resulting in decreased expenses to RCAC. It attempts to minimize this effect by comparing the reduction on this one circuit with the total revenues of RCAC. It must be remembered, however, that, as is set forth in the majority opinion, Mackay and RCAC presently compete directly to 24 points. And Mackay has stated for the record that it would seek authority to duplicate RCAC circuits to many other points. In fact, Mackay has indicated that as a matter of policy it would seek authority to duplicate the RCAC circuits to all points where there are significant or substantial amounts of traffic. Now, if the $50,000 or $60,000 which the majority admits RCAC

will lose through the duplication of circuits to the points herein involved, is multiplied by the numerous other circuits Mackay has indicated it would seek authority to duplicate and which, under the criteria set forth in the majority decision, Mackay would probably be authorized to duplicate regardless of the Commission's contention that this case does not establish a precedent, it is clear that a very substantial impact would be made on RCAC's revenues.

It appears to me that duplication for the sake of duplication, particularly where there is already ample and active competition from other telegraph circuits as well as the telephone and air mail services, must inevitably result in the weakening, not only of RCAC but of the entire United States international telegraph system through the dilution of revenues and the multiplication of expenses.

I should like to repeat what I said in my previous dissent to the majority decision of February 23, 1951. I do not intend my remarks to indicate that I would under all circumstances oppose the licensing of duplicate direct radiotelegraph circuits. I recognize that there may be times when the defense interests of this country, which are our overriding consideration, may require the establishment of duplicate circuits. I feel, however, that in other situations an applicant, in order to be successful, should be required to demonstrate that through the operation of a duplicate direct radiotelegraph circuit some public need would be served or some advantage would accrue to the public either immediately upon the grant of its application or in the readily foreseeable future. I do not see how the record made by Mackay in the entire proceeding herein can fairly be construed to demonstrate that the criteria I have set forth above have been met, even in part.

In view of all the foregoing, I am of the opinion that Mackay has not met the burden of proof imposed upon it as the applicant herein and that considerations of public interest, convenience and necessity require a denial of its applications.

* * * * * *

DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

I dissent. I agree with Commissioner Webster's sound and reasoned statement. In this highly complex field of international communications, the piling of competition on competition is not, as the majority recognizes, always a healthy thing. The Commission has failed to give sufficient weight to the fact that the A. C. & R. system, of which Mackay is a part, already competes for Netherlands and Portugal traffic. I think Mackay has utterly failed to show in this case that the interests of the United States are served by adding additional direct radio circuits to these points. In my judgment, the policy here adopted can and probably will lead to diminution of competition in the international common carrier communications field.

DISSENTING STATEMENT OF COMMISSIONER DOERFER

The former and bare assumption that competition in the international common carrier field is beneficial to the public interest has now received a gloss to the extent that improvements in service and reduction of rates resulted primarily from demonstrated competition. There is nothing in the record to warrant it. This conclusion is merely speculative.

The improvements found in the instant case are equivocal. A valid conclusion could be made that without competition, the indicated improvements would have occurred. Improvements in service without competition have occurred in other communication common carrier fields. Commission records and experience indicate as much in the recent and substantial progress made by the American Telephone and Telegraph Company.

If the competitive theory in the common carrier field is to prevail upon the rationalizations as set forth in the majority opinion, I see no further justification for any regulation of rates or service in the international communication common carrier field.

Even if the assumption be granted that the improvements in service stemmed directly from competition, the weakening of bargaining power of American carriers with foreign countries is infinitely more detrimental to our public interest than the modicum of improvements found by the majority.

I would adhere to the fundamental concept of regulation in the communication common carrier field—no duplication of service facilities unless the public interest warrants it. In the instant case there is no evidence of substance to warrant further competition.

Appendix B.

UNITED STATES COURT OF APPEALS,

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 13025.

RCA COMMUNICATIONS, INC.,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

MACKAY RADIO AND TELEGRAPH COMPANY, INC.,
Intervenor.

Appeal from the Federal Communications Commission

Decided October 11, 1956

Mr. JOHN T. CAHILL, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of Court, with whom Messrs. HOWARD R. HAWKINS and JAMES E. GREELEY were on the brief, for appellant, Mr. LOFTUS E. BECKER also entered an appearance for appellant.

Mr. WARREN E. BAKER, General Counsel, Federal Communications Commission, with whom Mr. RICHARD A. SOLOMON, Assistant General Counsel, Federal Communications Commission, and Messrs. DANIEL R. OHLBAUM and HENRY GELLER, Counsel, Federal Communications Commission, were on the brief, for appellee.

Mr. JAMES A. KENNEDY, with whom Messrs. JOHN F. GIBBONS and BURTON K. WHEELER were on the brief, for intervenor.

Before EDGERTON, Chief Judge, and PRETTYMAN and BAZELON, Circuit Judges.

PRETTYMAN, Circuit Judge: This is an appeal from an order of the Federal Communications Commission entered upon remand by this court pursuant to a mandate of the Supreme Court of the United States. The Commission's decision on remand, and its order based thereon, granted the applications of Mackay Radio and Telegraph Company, Inc., for modification of its license to operate additional radiotelegraph circuits with The Netherlands and Portugal and an additional radiotelegraph circuit with The Netherlands via Tangier relay. These additional circuits duplicate existing direct and via Tangier radiotelegraph circuits operated by RCA Communications, Inc. (called in this litigation "RCAC"), as well as direct and indirect cable telegraph circuits, direct radiotelephone service, and air mail service. RCAC appeals. Mackay appears as intervenor.

The original order of the Commission granting the application of Mackay was entered in 1951. RCAC appealed from that order, and this court reversed.[1] The Supreme Court granted certiorari and vacated our judgment,[2] remanding with directions to remand to the Commission. In so doing the Supreme Court laid down certain standards which the Commission should follow in order to reach a valid order. Mr. Justice Frankfurter, speaking for the Court, explained its rejection of the Commission's order in the following terms:

> "The Commission has not in this case clearly indicated even that its own experience, entirely apart from the tangible demonstration of benefit for which RCAC contends, leads it to conclude that competition is here desirable. It seems to have relied almost entirely

[1] RCA Communications v. Federal Communications Com'n, 91 U.S. App. D.C. 289, 201 F.2d 694 (1952).

[2] Federal Communications Com'n v. RCA Communications, Inc., 346 U.S. 86, 96 L.Ed. 1470, 73 S.Ct. 998 (1953).

> on its interpretation of national policy. Since the Commission professed to dispose of the case merely upon its view of a principle which it derived from the statute and did not base its conclusion on matters within its own special competence, it is for us to determine what the governing principle is.'"[1]

The Court went on to say that it is impossible to state without serious qualification that competition is favored as a national policy, and it denied that encouragement of competition as such is "the single or controlling reliance for safeguarding the public interest."[2] It further stated that "Had the Commission clearly indicated that it relied on its own evaluation of the needs of the industry rather than on what it deemed a national policy, its order would have a different foundation."[3] Rounding out its criticism of the Commission's action the Court said:

> "To say that national policy without more suffices for authorization of a competing carrier wherever competition is reasonably feasible would authorize the Commission to abdicate what would seem to us one of the primary duties imposed on it by Congress. And since we read the opinion of the Commission as saying precisely that, we think the case must be remanded for its reconsideration. We therefore do not say that authorization of Mackay under all the relevant circumstances, including the significance the Commission may rightly attribute to the facts on the basis of its experience, may not be in the public interest. We think it not inadmissible for the Commission, when it makes manifest that in so doing it is conscientiously exercising the discretion given it by Congress, to reach a conclusion whereby authorizations would be

---

[1] *Id.*, 346 U.S. at 91.

[2] *Id.* at 93.

[3] *Id.* at 94.

> granted wherever competition is reasonably feasible. This is so precisely because the exercise of its functions gives it accumulating insight not vouchsafed to courts dealing episodically with the practical problems involved in such determination. Here, however, the conclusion was not based on the Commission's own judgment but rather on the unjustified assumption that it was Congress' judgment that such authorizations are desirable."[1]

It follows that we must examine the decision on remand with this question in mind: Did the Commission again render a decision based upon an imagined national policy, or did it instead rely upon its own judgment in this matter, educated by experience, and supported by consonant findings?

The decision of the Commission contains (1) a history of this proceeding, (2) an evaluation of the part competition has played in the development of international telegraph communications since 1934, with emphasis on competitive, duplicate, direct circuits operated by competing radiotelegraph carriers, and (3) a detailed discussion of the applicability of the general conclusion that competition is feasible and beneficial to the specific circuits involved here. Thereafter the Commission set out conclusions and framed an order favorable to the applicant.

In discussing the importance of competition in the history of this sector of the communications industry, the Commission first pointed out that radiotelegraph circuits are handling an ever-increasing proportion of international message telegraph traffic. In 1934 there were 65 international radiotelegraph circuits in operation. At that time eleven points were being served by two or more competing direct circuits. RCAC and Mackay operated competing circuits to seven points. In 1954, the Commission said, "The total authorized direct circuits for all United States carriers were 137, of which 133 were

[1] *Id.* at 95-96.

actually operated. * * * Of those in operation, a total of 29 points had two or more circuits as follows: 14 points had two; 12 points had three; 2 points had four; and 1 point had five." It would thus appear that 77 of 133 operating circuits were competing duplicate circuits.

The Commission then declared that its experience has indicated that the ability to offer competing direct-circuit service is a major factor in the solicitation of new customers and tends to enhance greatly a carrier's competitive position. It concluded "that competition by direct circuits is probably the most important factor in the general radiotelegraph competitive picture."

During this period of substantial and increasing competition by duplicate direct circuits, the two corporations here involved, RCAC and Mackay, both showed healthy development. Both increased their shares of the industry's overall message volume. RCAC has exhibited ample earnings throughout the period. Mackey, although its financial record for the entire period shows as many years of net loss as of net profit, has nevertheless emerged in the most recent period, 1951-53, as a highly profitable concern. On the basis of the financial data before it, as outlined above, the Commission found that competition in direct radiotelegraph circuits is reasonably feasible.

With respect to public benefits arising out of such competition, the Commission cited greater plant investments, specific improvements in facilities and equipment, newly introduced services, and lower rates. It then stated that its experience in the field leads it to conclude that competition, while perhaps not the sole cause, was certainly an important factor in bringing about these public benefits.

The Commission then turned to the two applications at issue. It found that Mackay, since receiving permission to operate, has furnished adequate service and that not only Mackay but also its competitors have improved their equipment, facilities, and handling practices. The Commission concluded that these latter improvements substantiate its general experience that competition is an important factor in better service to the public.

With regard to new service to the points in question, it appears that since the initial decision granting Mackay's application RCAC has inaugurated "TEX" and "leased channel" services to The Netherlands. The Commission, admittedly not on the basis of direct proof but relying on its experience in the field to weigh the intangibles involved, saw a definite causal relationship between the prospect of effective competition and these innovations.

Turning to RCAC's recital of the adverse effects upon it and the industry of the introduction of the Mackay circuits, the Commission discussed first the alleged surplus capacity of RCAC. It pointed out that RCAC's actual surplus capacity has dropped, even in the face of its acquisition of four new channels to The Netherlands, this fact being due to the introduction of the new services just mentioned. The Commission justified its division of the diminishing Portuguese market by citing its general finding that effective competition there is in the public interest. It further observed that competition by Mackay has had the effect of spurring other types of competitors to improve service and to obtain a larger share of message traffic.

The Commission next discussed RCAC's claim of economic loss owing to the new competition. It first observed that there is no direct means of determining operating cost for a single circuit, and it challenged the means of allocation used by RCAC as being inaccurate. However, taking that method of allocation at face value, the Commission pointed out that it shows an increase in net income of over $13,000 per annum for the two circuits between 1950 and 1953. This, according to the Commission, indicates that competition is profitable. But, if the RCAC figures are credible, it would appear that the net loss on Portuguese service increased by $30,000 a year but was compensated for by a still greater increase in the net gain from service to The Netherlands.

The Commission dismissed RCAC's objection that additional scarce frequency bands will be used by Mackay's lines with the answer that this is unlikely but, if it should happen, benefits to the public would justify it.

Finally, after reiterating the Supreme Court's statement that no tangible benefits need be shown, the Commission concluded "that the reaffirmation of the Mackay applications gives ample ground for a reasonable expectation that competition will have not merely some, but a considerable, beneficial effect."

This summary of the Commission's decision on remand would appear to make it clear that it has not placed its reliance upon an imagined national policy favoring competition but, instead, has acted in accordance with its own best judgment; that it has brought its experience to bear throughout; and that it has bolstered its conclusions with factual data the great weight of which is consonant with the result.

It is true that the challenged RCAC figures show a greatly increased loss to RCAC on the Portuguese service, and no justification for considering this loss as compensated for by profits from The Netherlands circuits is presented in the Commission's discussion. It would appear that the Portuguese operation has been dealt a serious blow. But we think that the question whether the results of certain of a carrier's operations are to be viewed together or must be considered separately, operation by operation, is one peculiarly within the area of Commission judgment. So long as its treatment is not arbitrary we cannot change it. In the instant case we think its action in this respect was not unreasonable.

RCAC attacks the decision of the Commission on remand also because an initial decision by the hearing officer was not required and an initial decision by the Commission itself was not made. The Commission says the point was not raised before it and was not stated in the notice of appeal, and that the issue is therefore not properly before this court. RCAC replies that in its petition for rehearing upon the decision on remand it raised the issue as to the omission of the initial decision. But the only reference to an initial decision made in that petition was in the following: "The Commission determined to bypass its traditional procedures and omit an initial decision, thereby depriving RCA of any

opportunity to file exceptions and to be heard in oral argument. As a result, the full Commission has never heard oral argument upon the supplemental record * * *." It may well be disputed that the foregoing reference was sufficient to raise as an issue error in the omission of an initial decision. However that may be, it seems clear enough that the point was not raised in the notice of appeal or in the statement of reasons for appeal. Section 402(c) of the Communications Act[1] provides that in such an appeal the notice shall contain "a concise statement of the reasons on which the appellant intends to rely, separately stated and numbered". It is unnecessary for us to decide this procedural point, because the Commission made a finding upon the record that due and timely execution of its functions required that the record be certified to it by the hearing examiner without preparation of an initial or recommended decision. This was in the order for further hearings entered March 1, 1954, after the remand. No specific exception was ever taken to that portion of the order. Section 409(b) of the Communications Act[2] authorizes the omission of an initial decision and oral argument thereon where the Commission makes such a finding upon the record. RCAC says that the finding is without support in the record, but we think the outline we have already given of the proceedings in this matter, the importance of the case, and the fact that the further hearings and final decision were upon remand from the Supreme Court amply support the finding.

It appears to us that the Commission has brought itself within the requisites described by the Supreme Court for a valid order, and so that order will be

Affirmed.

---

[1] 48 STAT. 1093 (1934), as amended, 47 U.S.C.A. § 402(c).

[2] 66 STAT. 721 (1952), 47 U.S.C.A. § 409(b).

Appendix C.

A. Communications Act of 1934, as amended (47 U. S. C. §151 *et seq.*).

§151. "For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the 'Federal Communications Commission', which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter."

* * * * * *

§309 (a) "If upon examination of any application provided for in section 308 of this title the Commission shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application."

(b) "If upon examination of any such application the Commission is unable to make the finding specified in subsection (a) of this section, it shall forthwith notify the applicant and other known parties in interest of the grounds and reasons for its inability to make such finding. Such notice, which shall precede formal designation for a hearing, shall advise the applicant and all other known parties in interest of all objections

made to the application as well as the source and nature of such objections. Following such notice, the applicant shall be given an opportunity to reply. If the Commission, after considering such reply, shall be unable to make the finding specified in subsection (a) of this section, it shall formally designate the application for hearing on the grounds or reasons then obtaining and shall notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. The parties in interest, if any, who are not notified by the Commission of its action with respect to a particular application may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest at any time not less than ten days prior to the date of hearing. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate but in which both the burden of proceeding with the introduction of evidence upon any issue specified by the Commission, as well as the burden of proof upon all such issues, shall be upon the applicant."

(c) [Until amended by Pub. L. No. 391, 84th Cong. 2d Sess. (Jan. 20, 1956)] "When any instrument of authorization is granted by the Commission without a hearing as provided in subsection (a) of this section such grant shall remain subject to protest as hereinafter provided for a period of thirty days. During such thirty-day period any party in interest may file a protest under oath directed to such grant and request a hearing on said application so granted. Any protest so filed shall contain such allegations of fact as will show the protestant to be a party in interest and shall specify with particularity the facts, matters, and things relied upon, but shall not include issues or allega-

tions phrased generally. The Commission shall, within thirty days from the date of the filing of such protest, enter findings as to whether such protest meets the foregoing requirements and if it so finds the application involved shall be set for hearing upon the issues set forth in said protest, together with such further specific issues, if any, as may be prescribed by the Commission. In any hearing subsequently held upon such application all issues specified by the Commission shall be tried in the same manner provided in subsection (b) of this section, but with respect to all issues set forth in the protest and not specifically adopted by the Commission, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the protestant. The hearing and determination of cases arising under this subsection shall be expedited by the Commission and pending hearing and decision the effective date of the Commission's action to which protest is made shall be postponed to the effective date of the Commission's decision after hearing, unless the authorization involved is necessary to the maintenance or conduct of an existing service, in which event the Commission shall authorize the applicant to utilize the facilities or authorization in question pending the Commission's decision after hearing."

[Subsection (c) as amended by Pub. L. No. 391, 84th Cong. 2d Sess. (Jan. 20, 1956)] "When any instrument of authorization is granted by the Commission without a hearing as provided in subsection (a) hereof, such grant shall remain subject to protest as hereinafter provided for a period of thirty days. During such thirty-day period any party in interest may file a protest under oath directed to such grant and request a hearing on said application so granted. Any protest so filed shall be served on the grantee, shall contain such allegations of fact as will show the protestant to be a party in interest, and shall specify with particularity the facts relied upon by the protestant as showing that the grant was improperly made or would otherwise not be in the public interest. The Commission

shall, within thirty days of the filing of the protest, render a decision making findings as to the sufficiency of the protest in meeting the above requirements; and, where it so finds, shall designate the application for hearing upon issues relating to all matters specified in the protest as grounds for setting aside the grant, except with respect to such matters as to which the Commission, after affording protestant an opportunity for oral argument, finds, for reasons set forth in the decision, that, even if the facts alleged were to be proven, no grounds for setting aside the grant are presented. The Commission may in such decision redraft the issues urged by the protestant in accordance with the facts or substantive matters alleged in the protest, and may also specify in such decision that the application be set for hearing upon such further issues as it may prescribe, as well as whether it is adopting as its own any of the issues resulting from the matters specified in the protest. In any hearing subsequently held upon such application issues specified by the Commission upon its own initiative or adopted by it shall be tried in the same manner provided in subsection (b) hereof, but with respect to issues resulting from facts set forth in the protest and not adopted or specified by the Commission, on its own motion, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the protestant. The hearing and determination of cases arising under this subsection shall be expedited by the Commission and pending hearing and decision the effective date of the Commission's action to which protest is made shall be postponed to the effective date of the Commission's decision after hearing; unless the authorization involved is necessary to the maintenance or conduct of an existing service, or unless the Commission affirmatively finds for reasons set forth in the decision that the public interest requires that the grant remain in effect, in which event the Commission shall authorize the applicant to utilize the facilities or authorization in question pending the Commission's decision after hearing."

* * * * * *

§1009. "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—"

(a) "Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

(b) * * *

(c) * * *

(d) * * *

(e) "So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdictions, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

* * * * * *

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
Argument	6
Conclusion	10

CITATIONS

Cases:

Federal Communications Commission v. *RCA Communications, Inc.*, 346 U. S. 86 ..... 2, 3, 4, 6, 8

RCA Communications, Inc., v. *Federal Communications Commission*, 201 F. 2d 694 3

Statute:

Communications Act of 1934, 48 Stat. 1064 *et seq.* (47 U. S. C. 308 (a), 309 (a)):

Section 308 (a) 2

Section 309 (a) 2

415757—57

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 685

RCA COMMUNICATIONS, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

AND

MACKAY RADIO AND TELEGRAPH COMPANY, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 82–89) is reported at 238 F. 2d 24.

JURISDICTION

The judgment of the Court of Appeals, affirming the decision of the Federal Communications Commission, was entered on October 11, 1956. The petition for a writ of certiorari was filed on January 9, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission complied with the decision of this Court in *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U. S. 86, when, on remand, it concluded, upon its evaluation of the history of duplicate circuits in the international radiotelegraph field (including the history of the particular circuits here involved), that operation of duplicate circuits to Portugal and The Netherlands would be in the public interest.

2. Whether the Commission, in determining that operation of duplicate circuits to Portugal would be reasonably feasible, abused its discretion by taking into account a competing carrier's revenues from other circuits.

STATUTE INVOLVED

Sections 308 (a) and 309 (a) of the Communications Act of 1934, 48 Stat. 1064 *et seq.* (47 U. S. C. 308 (a), 309 (a)), provide as follows:

> § 308. (a) The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by it: * * *
>
> § 309. (a) If upon examination of any application provided for in section 308 of this title the Commission shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

STATEMENT

Petitioner is a common carrier furnishing radiotelegraph service between the United States and

numerous foreign points, including direct service to Portugal and The Netherlands. In 1951, after hearing, the Federal Communications Commission granted an application by Mackay Radio and Telegraph Company ("Mackay") for authority to establish duplicate direct radiotelegraph circuits to those countries. The Commission based its decision on the ground that operation of such circuits would be "reasonably feasible" and would result in more effective competition; and that, because of the "national policy favoring of competition," duplicate service is in the public interest whenever it is "reasonably feasible." Shortly thereafter, no stay having been obtained, the circuits authorized by the Commission were established by Mackay and have been in continuous service since that time.

On review, the Court of Appeals for the District of Columbia Circuit reversed, holding that the Commission could authorize a competing facility as in the public interest only if it found that demonstrable tangible benefit to the public would result. *RCA Communications, Inc.*, v. *Federal Communications Commission*, 201 F. 2d 694. This Court, in turn, vacated the judgment of the Court of Appeals and remanded the case to that court with instructions to remand to the Commission for further proceedings. *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U. S. 86.

This Court held (p. 95) that the Commission had erred in concluding that "national policy without more suffices for authorization of a competing carrier whenever competition is reasonably feasible * * *."

In the Court's view (p. 94), the Commission must "warrant, as it were, that competition would serve some beneficial purpose such as maintaining good service and improving it" (p. 97). Thus, the Commission was required to make its own expert "evaluation of the needs of the industry" (p. 94) and to determine, "on the basis of its experience" (p. 95) and "accumulating insight" (p. 96), whether there was "ground for reasonable expectation that competition may have some beneficial effect" (p. 97). In this connection, the Court stated (p. 96) that "it [is] not inadmissible for the Commission, when it makes manifest that in so doing it is conscientiously exercising the discretion given it by Congress, to reach a conclusion whereby authorizations would be granted wherever competition is reasonably feasible."

The Court also held (pp. 96–97) that, "[i]n reaching a conclusion that duplicating authorizations are in the public interest wherever competition is reasonably feasible, the Commission is not required to make specific findings of tangible benefit. It is not required to grant authorizations only if there is a demonstration of facts indicating immediate benefit to the public. To restrict the Commission's action to cases in which tangible evidence appropriate for judicial determination is available would disregard a major reason for the creation of administrative agencies, better equipped as they are for weighing intangibles 'by specialization, by insight gained through experience, and by more flexible procedure.' * * * In the nature of things, the possible benefits of competition do not lend themselves to detailed forecast, * * * RCAC

contention that an applicant must demonstrate tangible benefits is asking too much * * *."

After further hearings on remand (Pet. 18), the Commission reaffirmed the grants to Mackay. In a lengthy opinion (Pet. 15–68), the Commission concluded that the evidence, when reviewed "in the light of the twenty years' experience of this Commission in the regulation of international telegraph communications" (Pet. 64), established that competition between direct radiotelegraph circuits "has been an important factor in inducing the carriers to improve their plant facilities and services, to introduce new services, and to institute rate reduction for service to the public", and thus "generally has resulted in public benefit" (Pet. 39; see Pet. 57, 65); that the record with respect to service to Portugal and The Netherlands since 1951 (when Mackay instituted service to those countries) "substantiate[d] our experience in the field generally" (Pet. 43), since the introduction of Mackay competition "apparently has been a factor in spurring all carriers * * * to redouble their efforts to better serve the public in order to retain or improve their relative shares of the traffic" (Pet. 49), and has resulted in improved service (Pet. 42–43); that such competition by Mackay is "reasonably feasible" (Pet. 65); and that there are "ample grounds for a reasonable expectation that continued operation of the circuits at issue by Mackay will have considerable beneficial effect in the future" (Pet. 66). The Commission emphasized (*ibid.*) that it was granting the applications "on the basis of the relevant data in the particular case now before us," and it was not

"enunciating a general policy with respect to the licensing of duplicate direct radiotelegraph circuits in international telegraph communications."

The Court of Appeals unanimously affirmed. After carefully reviewing the Commission's decision, the court concluded (Pet. 88) that the Commission "has not placed its reliance upon an imagined national policy favoring competition but, instead, has acted in accordance with its own best judgment; that it has brought its experience to bear throughout; and that it has bolstered its conclusions with factual data the great weight of which is consonant with the result."

ARGUMENT

1. Petitioner's principal contention (Pet. 9–13) is that the Commission's decision on remand misapplied this Court's prior ruling in *Federal Communications Commission* v. *RCA Communications*, 346 U. S. 86. There this Court held that the Commission could not grant duplicate radiotelegraph authority solely because of an alleged national policy in favor of competition, but was required to exercise its expert judgment to determine, "on the basis of its experience" (p. 95) and "accumulating insight" (p. 96), whether there was "ground for reasonable expectation that competition may have some beneficial effect" (p. 97).

We submit that the Court of Appeals correctly held (Pet. 88) that the Commission, in its decision on remand, did not rely "upon an imagined national policy favoring competition, but, instead, has acted in accordance with its own best judgment; that it has brought its

Commission v. *RCA Communications*, 346 U. S. 86.

experience to bear throughout; and that it has bolstered its conclusions with factual data * * *," and that it therefore "has brought itself within the requisites described by the Supreme Court for a valid order" (Pet. 89). The Commission's finding that grant of the Mackay applications would serve the public interest rested upon a thorough analysis of the history of competitive circuits in the international radiotelegraph field, both generally and with respect to actual operations to Portugal and The Netherlands since 1951. On the basis of this analysis, the Commission concluded (Pet. 64–66) that competition had been an important factor in improving international radiotelegraph service, and that there were "ample grounds for a reasonable expectation that continued operation of the circuits at issue by Mackay will have considerable beneficial effect in the future" (Pet. 66).

Petitioner urges (Pet. 3, 11) that the Commission on remand merely substituted "an unidentified and unspecified experience * * * for its discredited theory of national policy in favor of competition," and that the Commission could not "warrant the anticipated or past effect of competition where such warranty rests on its experience without laying bare that experience on the record." This argument, however, is not only based on a misconception of the essential character of the administrative process, but is indeed contrary to the decision of this Court in the earlier phase of this case. As this Court there pointed out, "To restrict the Commission's action to cases in which tangible evidence appropriate for judicial determination is available would disregard a major reason

for the creation of administrative agencies, better equipped as they are for weighing intangibles 'by specialization, by insight gained through experience, and by more flexible procedure' * * * RCAC's contention that an applicant must demonstrate tangible benefits [of competition] is asking too much * * *" (346 U. S. at pp. 96–97). And the Commission was admonished to make "its own evaluation of the needs of the industry" (p. 94); to reach "its independent conclusion, from the impact upon it of the trends and needs of this industry" (p. 95); to consider "all the relevant circumstances, including the significance the Commission may rightly attribute to the facts on the basis of its experience" (p. 95); and to apply its "accumulating insight not vouchsafed to courts * * *" (p. 96). In carrying out this mandate, the Commission relied on its experience in drawing the inference from the extensive record that the improvements in service, facilities, and rates which, the record showed, generally accompanied competition between duplicate circuits, resulted to a major degree from such competition. By its very nature, such an inference can only rarely be ~~neither~~ "proven" or "disproven" by further evidence. In any area of business operations such as this one, where complex and varying economic forces play their individual yet interrelating roles, the evaluation of the specific impact of any one factor must necessarily be a matter of judgment on the part of the specialized regulatory body.

Moreover, petitioner is quite in error in characterizing the experience relied upon by the Commission

as "unidentified and unspecified" (Pet. 3, 9, 11). As already pointed out, the Commission's report contains a detailed analysis of the history of competitive circuits in the international radiotelegraph field, both generally and with respect to actual operations to Portugal and The Netherlands since 1951. In short, contrary to petitioner's contention, the Commission did not rely on its experience "without laying bare that experience on the record" (Pet. 11). The question, in any event, is a narrow one, since the Commission did not grant the Mackay applications pursuant to any "general policy" with respect to the licensing of duplicate circuits, but did so only "on the basis of the relevant data in the particular case now before us" (Pet. 66).

2. Petitioner further contends (Pet. 13) that the Commission, in holding that operation of the duplicate circuits to Portugal was reasonably feasible, erred in taking into account petitioner's overall financial position, and should have limited itself to considering petitioner's revenues from the Portuguese traffic. But, as the Court of Appeals pointed out (Pet. 88), "The question whether the results of certain of a carrier's operations are to be viewed together or must be considered separately, operation by operation, is one peculiarly within the area of Commission judgment." The court concluded (*ibid.*) that the Commission's refusal to consider petitioner's Portuguese revenues separately was "not unreasonable," and we submit that the correctness of that conclusion presents no issue of sufficient importance to warrant review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
VICTOR R. HANSEN,
Assistant Attorney General.
DANIEL M. FRIEDMAN,
Attorney.

WARREN E. BAKER,
General Counsel,
RICHARD A. SOLOMON,
Assistant General Counsel,
JOHN J. O'MALLEY, JR.,
Counsel,
Federal Communications Commission.

FEBRUARY 1957.

U. S. GOVERNMENT PRINTING OFFICE: 1957

Office - Supreme Court, U.S.
FILED
FEB 8 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 685.

RCA COMMUNICATIONS, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and MACKAY RADIO AND TELEGRAPH COMPANY, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR MACKAY RADIO AND TELEGRAPH COMPANY, INC., IN OPPOSITION.

JAMES A. KENNEDY,
JOHN F. GIBBONS,
Attorneys for Respondent Mackay Radio and Telegraph Company, Inc.,
67 Broad Street,
New York 4, N. Y.

Of Counsel:
WHEELER & WHEELER
BURTON K. WHEELER
ROBERT G. SEAKS
704 Southern Building
Washington 5, D. C.

February 8, 1957

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

INDEX.

	PAGE
QUESTION PRESENTED	1
STATEMENT	2
ARGUMENT	5
CONCLUSION	9

Table of Cases.

	PAGE
Federal Communications Commission v. *RCA Communications, Inc.*, 346 U. S. 86	1, 2, 3
Federal Trade Commission v. *Beech-Nut Packing Company*, 257 U. S. 441	8
Federal Trade Commission v. *Morton Salt Company*, 334 U. S. 37	8
McLean Trucking Co. v. *United States*, 321 U. S. 67	8
RCA Communications, Inc. v. *Federal Communications Commission*, 201 F. 2d 694	2
United States v. *Detroit & Cleveland Navigation Company*, 326 U. S. 236	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 685.

RCA COMMUNICATIONS, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and MACKAY RADIO AND TELEGRAPH COMPANY, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR MACKAY RADIO AND TELEGRAPH COMPANY, INC., IN OPPOSITION.

Question Presented.

Whether the Federal Communications Commission violated this Court's mandate in *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U. S. 86, in basing an authorization of competitive radiotelegraph circuits to The Netherlands and Portugal upon a conclusion, supported by detailed findings and its experience in the field, that public benefits were reasonably to be expected from the competition.

Statement.

In 1951 the Federal Communications Commission (FCC) granted to Mackay Radio and Telegraph Company, Inc. (Mackay) authority to operate direct radiotelegraph circuits between the United States and The Netherlands and Portugal. The grants (based on applications filed by Mackay in 1946 and 1947) were made over the opposition of Petitioner which for many years had operated the only direct radiotelegraph circuits between the United States and these countries. FCC predicated its 1951 decision, not specifically on findings that the introduction of competition would produce tangible public benefits, but almost entirely on the ground that national policy favored competition where reasonably feasible, as it was found to be (Petition, pp. 18-22).

On review, FCC's decision was set aside by the Court of Appeals for the District of Columbia which held (2 to 1) that the authorization of competitive circuits could not be sustained in the absence of a finding that demonstrable and tangible benefits to the public would result. *RCA Communications, Inc.* v. *Federal Communications Commission*, 201 F. 2d 694.

This Court (Justice Douglas dissenting) reversed the judgment of the Court of Appeals, found FCC's decision also insupportable, and directed remand of the cause to FCC "for such disposition as is open under this opinion." *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U. S. 86, 98. This Court's opinion stated that FCC, without indicating that its own experience led it to conclude that competition was desirable in the particular

circumstances presented, "seems to have relied almost entirely on its interpretation of national policy" (*Id.* at p. 91). FCC, in thus relying on a reading of national policy "too loose and too much calculated to mislead," had abrogated the primary duty Congress imposed upon it, by failing to bring to bear its own expertise and judgment in the field (*Id.* at p. 95). This Court continued (*Id.* at pp. 96-97, citations and footnotes omitted):

> "In reaching a conclusion that duplicating authorizations are in the public interest wherever competition is reasonably feasible, the Commission is not required to make specific findings of tangible benefit. It is not required to grant authorizations only if there is a demonstration of facts indicating immediate benefit to the public. To restrict the Commission's action to cases in which tangible evidence appropriate for judicial determination is available would disregard a major reason for the creation of administrative agencies, better equipped as they are for weighing intangibles 'by specialization, by insight gained through experience, and by more flexible procedure.' In the nature of things, the possible benefits of competition do not lend themselves to detailed forecast, but the Commission must at least warrant, as it were, that competition would serve some beneficial purpose such as maintaining good service and improving it. Although we think RCAC's contention that an applicant must demonstrate tangible benefits is asking too much, it is not too much to ask that there be ground for reasonable expectation that competition may have some beneficial effect. Merely to assume that competition is bound to be of advantage, in an industry so regulated and so largely closed as is this one, is not enough."

On remand, FCC reopened the cause for further hearing.* Following the hearing (which occupied nine hearing days spread over several months), FCC issued the decision here complained of, again granting to Mackay direct circuits to The Netherlands and Portugal, enabling it to compete with Petitioner. FCC's exhaustive review and analysis of the record led it to conclude that the competition envisaged by Mackay's applications was reasonably feasible and that there were "ample grounds for a reasonable expectation that continued operation of the circuits at issue by Mackay will have considerable beneficial effect in the future" (Pet., p. 66).

The Court of Appeals unanimously sustained FCC's decision. It summarized that decision and concluded (Pet., p. 88):

> "This summary of the Commission's decision on remand would appear to make it clear that it has not placed its reliance upon an imagined national policy favoring competition but, instead, has acted in accordance with its own best judgment; that it has brought its experience to bear throughout; and that it has bolstered its conclusions with factual data the great weight of which is consonant with the result."

---

* Both Petitioner and Mackay petitioned FCC, urging that it decide the cause favorable to them on the then existing record. FCC held oral argument on the petitions and rejected these views. It ordered further hearing both to bring the record up to date and to inquire particularly into the actual working of competition between Petitioner and Mackay in serving The Netherlands and Portugal. Mackay initiated radiotelegraph service to Portugal and to The Netherlands (via Tangier relay) in 1951, after the Court of Appeals denied Petitioner's request to stay the effectiveness of FCC's grants to Mackay (Pet., pp. 16-18).

Argument.

The petition presents no substantial question or special and important reasons meriting review by this Court. In its prior opinion, this Court provided a full and clear exposition of the legal principles and guides to be applied under the Communications Act where FCC proposes a grant of competitive direct international radiotelegraph circuits. It would not comport with the proper functions of this Court to accord a second review to a relatively restricted situation where the guiding legal principles have been thus fully analyzed.

The Court of Appeals dealt extensively with all of Petitioner's arguments in this regard, and unanimously concluded that it was clear FCC had adhered to the requirements of the mandate. The composition of the Court of Appeals which sustained FCC's decision on remand was identical with that of the court which reversed FCC's first decision.

FCC's decision on remand, predicated on the expertise accumulated by experience, recited in detail its experience in two respects. In the first place, FCC examined the history of competition between international message carriers, particularly Petitioner and Mackay, since 1934 when FCC was created. It found that Petitioner and Mackay have increasingly competed since 1934;* that direct radiotelegraph circuits are the most important factor in the over-all competitive picture; that Petitioner enjoyed substantial net operating revenues throughout the period and that Mackay has latterly enjoyed substantial net operating revenues;

---

* Petitioner and Mackay operated direct and competitive circuits to 7 points in 1934; they operated such circuits to 24 points in 1954. Considering other carriers, the number of points to which there was direct radiotelegraph competition rose from 11 in 1934 to 29 in 1954 (Pet., p. 27).

that despite increasing competition between themselves, both Petitioner and Mackay increased their respective shares of the total traffic volume and revenues; and that competition in direct radiotelegraph circuits was an important factor in (1) the large investments by both Petitioner and Mackay in new and improved plant, (2) the introduction of more modern equipment and facilities, as well as improved central office traffic handling procedures, (3) the development of new services (leased channel, scheduled transmission and TEX service between teleprinter stations) which fill a public need, and (4) the rate reductions introduced after World War II and the fact that current rates per full-rate word are below those in effect in 1939 (Pet., pp. 64-65). These conclusions rested on a detailed historical analysis (Pet., pp. 22-39).

In the second place, FCC examined the actual results of competition between Petitioner and Mackay in directly serving the points involved here—The Netherlands and Portugal since 1951. It found that direct radiotelegraph competition was reasonably feasible; that the detrimental results Petitioner alleged would ensue had either not occurred or were outweighed by public benefits; that the competition had been a factor in causing (1) the improvement in facilities, plant and service which actually took place, and (2) the introduction of new and lucrative services to The Netherlands;* and that "there are ample grounds for a reasonable expectation that continued operation of the circuits at issue by Mackay will have considerable bene-

---

* FCC found that Petitioner had substantially increased its 1953 channel capacity to The Netherlands over that in 1948, but that its spare message capacity was lower in 1953 than in 1948. In detail, "eight out of nine channels were regularly used to provide service in 1953, or almost 90 per cent utilization, whereas in 1947 one out of four channels was regularly used, or a 25 per cent utilization" (Pet., p. 46).

ficial effect in the future" (Pet., pp. 65-66). As an example of the particularized findings on which these ultimate findings rested, FCC found (Pet., pp. 42-43): "There has, for example, been no further evidence at the further hearings of complaints with respect to RCAC's service from its correspondents in The Netherlands and Portugal of the type that were introduced in the course of the original hearings."

Against these findings, Petitioner argued below, and suggests here, that FCC merely found that direct radiotelegraph competition was an "important factor" in producing the tangible public benefits enumerated (new and improved plant, new services, rate reductions, and the like); and that, taking into account both (1) the existence of other competition from radiotelephone, air mail, cables, and indirect radiotelegraph circuits, and (2) the fact of Petitioner's general desire to improve service, apart from the spur of competition, FCC has failed to find that these tangible benefits were the direct result of direct radiotelegraph competition. Petitioner is here recasting and stiffening its argument—previously rejected by this Court as asking too much—that a grant of competitive circuits could be justified only on a finding that tangible benefits to the public would result. Petitioner now demands that this Court review and strike down FCC's informed and expert judgment that past competition has been beneficial because FCC cannot say with scientific precision that the tangible benefits found flowed exclusively from direct radiotelegraph competition, without any other factors or considerations operative.

Petitioner would force an impossible standard on FCC. The nature of the subject precludes scientific absolutism, and informed judgment and reasonable probabilities are an unavoidable and necessary substitute. With regard to a subject so complex and elusive as the determination of "competitive effects," ultimate verities are impossible

and expert surmise suffices. *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 89; *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U. S. 236, 241. Reversing the coin, we invite attention to the fact that the administrative determination by an antitrust enforcement agency as to what constitutes a "restraint of competition" is judicially supportable though the agency relies on reasonable probabilities and tendencies. *E. g., Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441; *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37.

This Court's first opinion provides an explicit answer to Petitioner's present arguments, and establishes that no new issues are here tendered. The Court's opinion stated that FCC, in granting competitive circuits, "is not required to make specific findings of tangible benefit." It recognized that "in the nature of things, the possible benefits of competition do not lend themselves to detailed forecast." It found that "to restrict the Commission's action to cases in which tangible evidence appropriate for judicial determination is available would disregard a major reason for the creation of administrative agencies, better equipped as they are for weighing intangibles 'by specialization, by insight gained through experience, and by more flexible procedure.'" In the face of such expressions by this Court, it is without merit to insist that FCC's reliance on experience, carefully recited, is defective if it cannot be proven with absolute finality that past competition brought benefits, neither influenced by nor perhaps attributable in part to any other consideration.

FCC did not err in finding that competition in service to Portugal was "reasonably feasible." It rejected Petitioner's studies designed to show that it was losing money in offering service to Portugal, pointing out specific defects in the studies and the impossibility in view of the nature of Petitioner's operations of directly determining "even the

approximate cost attributable to the provision of telegraph service to The Netherlands and Portugal" (Pet., pp. 56-57). In the absence of credible evidence as to Petitioner's alleged losses in serving Portugal, FCC properly took into account its over-all satisfactory earnings and financial position, including the fact that even Petitioner's studies showed that its combined operations to The Netherlands and Portugal resulted in significantly larger profits in 1953 than in 1950 before Mackay's direct competition was introduced (Pet., p. 57). Furthermore, competition in service with Portugal is particularly desirable in that Petitioner in 1950 enjoyed 55.8% of *all* outbound and 84.2% of *all* inbound traffic exchanged with Portugal (including both cable and radiotelegraph traffic) (Pet., p. 60).

Conclusion.

The decision below correctly determined that FCC has complied with the requirements of this Court's mandate. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

JAMES A. KENNEDY,
JOHN F. GIBBONS,
Attorneys for Respondent Mackay Radio
and Telegraph Company, Inc.,
67 Broad Street,
New York 4, N. Y.

Of Counsel:
WHEELER & WHEELER
BURTON K. WHEELER
ROBERT G. SEAKS
704 Southern Building
Washington 5, D. C.

February 8, 1957